Supreme Court, U.S.
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(1)

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No. _____

In The

Supreme Court of the United States

IN RE: GARY A. TAYLOR AND
WILLIAM S. HARRIS,

Petitioners.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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70 pp + 1/0

QUESTION PRESENTED

Does 21 U.S.C. §848(q) afford federal habeas corpus petitioners, who were sentenced to death by state courts, the right to appointed counsel in clemency and competency proceedings?

LIST OF PARTIES

This petition seeks review of a decision denying the right to appointed counsel and to attorneys' fees in clemency and competency proceedings in two separate but related cases. Petitioner Gary A. Taylor was appointed as counsel for a federal habeas corpus capital petitioner, Jack Wade Clark. Petitioners Taylor and William S. Harris were appointed as counsel for a second federal habeas corpus capital petitioner, Juan Soria. The appointments were pursuant to a federal statute, 21 U.S.C. §848(q). Mr. Clark and Mr. Soria were eventually executed by the State of Texas.

The respondent in both proceedings below was Gary L. Johnson, then the Director of the Texas Department of Criminal Justice, Institutional Division. Pursuant to Supreme Court Rule 35.3, Janie Cockrell, the new Director of the Texas Department of Criminal Justice, Institutional Division, should be substituted in place of her predecessor, Gary L. Johnson. In the proceedings below in *Clark v. Johnson (In re: Taylor)*, Ms. Gena Bunn, Assistant Attorney General for the State of Texas, advised the U.S. Court of Appeals that neither the Texas Department of Criminal Justice, the Office of the Attorney General nor the State of Texas had any interest or role in that appeal.

Though not named as parties below, at the suggestion of the Clerk of this Court, counsel is serving this petition upon the United States Solicitor General and the Clerks of the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
LIST OF APPENDICES	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
1. *Clark v. Johnson (In re Taylor)*	3
2. *Soria v. Johnson (In re: Harris and Taylor)*	5
REASONS FOR GRANTING THE PETITION	9
1. The Fifth Circuit's erroneous interpretation of 21 U.S.C. §848(q) conflicts with the ruling of the Eighth Circuit and several district courts	9
a. Section 848(q) plainly requires the appointment of counsel for clemency and competency proceedings	9
b. The circuits are split	13
2. The Fifth Circuit's narrow reading of 21 U.S.C. §848(q) runs counter to the principles of *McFarland v. Scott*	18
3. The issue is exceptionally important	22
CONCLUSION	28

LIST OF APPENDICES

Page

A. Opinion of the United States Court of Appeals for the Fifth Circuit in *Clark v. Johnson (In re: Taylor)*, filed January 2, 2002 ..... 1a

B. Order of the United States Court of Appeals for the Fifth Circuit in *Soria v. Johnson (In re: Harris, Taylor)*, granting rehearing and affirming, filed January 28, 2002 ..... 9a

C. Order of the United States District Court for the Northern District of Texas in *Clark v. Johnson (In re: Taylor)*, filed April 6, 2001 ..... 11a

D. Order of the United States District Court for the Northern District of Texas in *Soria v. Johnson (In re: Harris, Taylor)*, filed April 9, 2001 ... 13a

E. Order of the United States Court of Appeals for the Fifth Circuit in *Clark v. Johnson (In re: Taylor)*, denying the petition for rehearing en banc, filed January 28, 2002 ..... 16a

F. Relevant Statutory Provisions 18a

G. Letter dated February 13, 2001 from Gary A. Taylor to the United States District Court for the Northern District of Texas in *Clark v. Johnson (In re: Taylor)* 21a

H. Criminal Justice Act Voucher submitted by Gary A. Taylor to the United States District Court for the Northern District of Texas in *Clark v. Johnson (In re: Taylor)* [accompanying timesheets omitted] 23a

I. Response to Show Cause Order from William S. Harris and Gary Taylor to the United States District Court for the Northern District of Texas in *Soria v. Johnson (In re: Harris, Taylor)* (excerpt), filed November 22, 2000 ..... 25a

TABLE OF AUTHORITIES

Page

CASES

Barnard v. Collins, 13 F.3d 871 (5th Cir.), *cert. denied*, 510 U.S. 1102 (1994) 15

Caldwell v. Johnson, 226 F.3d 367 (5th Cir. 2000) 26

Cantu-Tzin v. Johnson, 162 F.3d 295 (5th Cir. 1998) ..5, 19

Chambers v. Johnson, 133 F. Supp. 2d 931 (E.D. Tex. 2001) 4, 8

Clark v. Johnson, 202 F.3d 760 (5th Cir. 2000) 3

Clark v. Johnson (In re: Taylor), 278 F.3d 459 (5th Cir. 2002) 1, 2, 8

Clark v. Johnson, 531 U.S. 831 (2000) 3

Connecticut National Bank v. Germain, 503 U.S. 249 (1992) 11

Duncan v. Walker, 533 U.S. 167 (2001) 9, 12

Ex parte Caldwell, 58 S.W.3d 127 (Tex. Crim. App. 2000) 25, 27

Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866) 11

Ford v. Wainwright, 477 U.S. 399 (1986)... 20, 21, 25, 27

Furman v. Georgia, 408 U.S. 238 (1972) 17, 22

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 12

Graham v. Johnson, 168 F.3d 762 (5th Cir. 1999), *cert. denied*, 529 U.S. 1097 (2000) 26

Gregg v. Georgia, 428 U.S. 227 (1976) 17

Herrera v. Collins, 506 U.S. 390 (1993) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Hill v. Lockhart, 992 F.2d 801 (8th Cir. 1993) ..... *passim*

In re Lindsey, 875 F.2d 1502 (11th Cir. 1989) 15, 16

Lowery v. Anderson, 138 F. Supp. 2d 1123 (S.D. Ind. 2001).....14, 23

Lucas v. Johnson, 132 F.3d 1069 (5th Cir.), *cert. dismissed*, 524 U.S. 965 (1998) 26

McFarland v. Scott, 512 U.S. 849 (1994) 18, 19, 22

McLaughlin v. Bronson, 537 A.2d 1004 (Conn. 1988) 12

Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998)..... 19

Remeta v. Florida, 559 So.2d 1132 (Fla. 1990)..... 23

Rudd v. Cockrell, 122 S.Ct. 585 (2001)..... 25

Rudd v. Cockrell, No. 01-11437 (5th Cir. Nov. 14, 2001)..... 25

Rudd v. Johnson, 2001 U.S. Dist. LEXIS 18315 & 18798 (N.D. Tex. 2001)..... 25

Schick v. Reed, 419 U.S. 256 (1974)..... 12

Soria v. Johnson, 207 F.3d 232 (5th Cir. 2000)..... 5

Soria v. Johnson, 530 U.S. 1286 (2000)..... 7

In re Soria, 530 U.S. 1287 (2000)..... 7

Sterling v. Scott, 57 F.3d 451 (5th Cir. 1995)..... 15

Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) 20

Strickler v. Greene, 57 F. Supp. 2d 313 (E.D. Va. 1999).....14, 23

TABLE OF AUTHORITIES – Continued

Page

Thompson v. Oklahoma, 487 U.S. 815 (1988) 22

United States v. Menasche, 348 U.S. 528 (1955) 12

United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833) 19

Weeks v. Jones, 100 F.3d 124 (11th Cir. 1996) 15

Williams v. Taylor, 529 U.S. 362 (2000) 12

Woodson v. North Carolina, 428 U.S. 280 (1976) 17

CONSTITUTIONAL PROVISIONS

U.S. CONST., art. II, §2, cl. 1 11

STATUTES AND RULES

21 U.S.C. §848(q) ..... *passim*

21 U.S.C. §848(q)(4)(B) ..... *passim*

21 U.S.C. §848(q)(7) 18

21 U.S.C. §848(q)(8) ..... *passim*

21 U.S.C. §848(q)(9) 13, 14

21 U.S.C. §848(q)(10) 13

21 U.S.C. §848(q)(10)(A) 10, 13, 14

21 U.S.C. §848(q)(10)(B) 10, 13, 14

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 2

28 U.S.C. §2244(b) 26

28 U.S.C. §2244(d) 26

28 U.S.C. §2254 ..... 5, 10

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. §2254(a) 2

28 U.S.C. §2254(b)(1) 11

28 U.S.C. §2254(d) 26

Anti-Drug Abuse Amendments Act, Pub. L. 100-690 ..... 9, 13

Anti-Terrorism and Effective Death Penalty Act, Pub. L. 104-132 13

FLA. STAT. §922.07(1) 23

FLA. STAT. §925.035(4) 23

FLA. STAT. §925.036 23

SUP. CT. R. 12.4 1

SUP. CT. R. 35.3 ii

TEX. ADMIN. CODE §143.57(b) 20

OTHER AUTHORITIES

4 W. Blackstone, COMMENTARIES (1769) 27

The Constitution Project, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY (2001) 24

Death Penalty Information Center, *Number of Executions By State Since 1976*, available at: http://www.deathpenaltyinfo.org/dpicreg.html (last visited April 19, 2002) 17, 23

Death Penalty Information Center, *Upcoming Executions*, available at: http://www.deathpenaltyinfo.org/executionalert.html (last visited April 19, 2002) 23

TABLE OF AUTHORITIES – Continued

Page

Lewis, Dorothy O., et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838 (1986) 24

Nat'l Mental Health Assoc., *Death Penalty and People With Mental Illness*, available at: http://www.mha-mi.org/policy44.html (last visited April 19, 2002) 24

Payment of Court-Appointed Counsel in Appeals Arising Out of State Capital Convictions, available at: http://www.ca4.uscourts.gov (last visited April 11, 2002) 14

U.S. Dep't of Justice, Bureau of Justice Statistics, *Capital Punishment 2000* (Dec. 2001), available at: http://www.ojp.usdoj.gov/bjs/abstract/cp00.htm (last visited April 19, 2002) 24

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgments below. Despite the unequivocal language of a federal statute, the United States Court of Appeals for the Fifth Circuit has held that people sentenced to death by state courts have no right to counsel in clemency and competency proceedings. This Court's review is essential to resolve a split in the circuits and to ensure that all individuals sentenced to death have a meaningful opportunity to seek clemency and to have a court determine whether they are competent to be executed.

This petition seeks review of two separate judgments that involve identical or closely related questions within the meaning of Supreme Court Rule 12.4.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Fifth Circuit in *Clark v. Johnson (In re: Taylor)* is Appendix A to the petition (App. 1a, *infra*) and is reported at 278 F.3d 459 (5th Cir. 2002). The unpublished decision of the United States District Court is Appendix C to the petition (App. 11a, *infra*).

The unpublished order of the United States Court of Appeals for the Fifth Circuit in *Soria v. Johnson (In re: Harris and Taylor)* is Appendix B to the petition (App. 9a, *infra*). The unpublished decision of the United States

District Court is Appendix D to the petition (App. 13a, *infra*).

JURISDICTION

In *Clark v. Johnson (In re: Taylor)*, the district court entered its order on April 6, 2001. *See* App. 11a. On January 2, 2002, the United States Court of Appeals for the Fifth Circuit affirmed in a published opinion, finding jurisdiction to review the ruling as either a final order or as an appealable collateral order. *See* App. 1a. A petition for rehearing en banc was denied on January 28, 2002. *See* App. 16a. In *Soria v. Johnson (In re: Harris and Taylor)*, the district court entered its order on April 9, 2001. *See* App. 13a-14a. On July 23, 2001, the United States Court of Appeals for the Fifth Circuit dismissed the petitioner's appeal for lack of jurisdiction. *See* App. 10a. On January 28, 2002, the court of appeals granted rehearing on the basis of *Clark*, vacated its earlier order of dismissal and affirmed the district court. *See* App. 16a.

In both cases, the district court had jurisdiction over the appointment and compensation of counsel pursuant to 21 U.S.C. §848(q) and had jurisdiction over the federal habeas corpus petition pursuant to 28 U.S.C. §2254(a). The court of appeals had jurisdiction pursuant to 28 U.S.C. §1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant portions of 21 U.S.C. §848(q) are reprinted as Appendix F, *infra*, at App. 18a.

STATEMENT OF THE CASE

1. ***Clark v. Johnson (In re: Taylor)***

Jack Wade Clark was convicted of capital murder in 1991 and was sentenced to death. *See* App. 1a. After the state post-conviction proceedings concluded, the United States District Court appointed petitioner Gary A. Taylor to represent Mr. Clark, pursuant to 21 U.S.C. §848(q). *See id.*

Mr. Taylor filed a habeas corpus petition in the district court, which was denied. *See id.* Section 848(q)(8) provides that an attorney appointed in a capital federal habeas corpus case "*shall* represent the defendant throughout every subsequent stage of available judicial proceedings, including . . . appeals [and] applications for writ of certiorari . . . ." *Id.* (emphasis added). Counsel sought to appeal on behalf of Mr. Clark to the United States Court of Appeals for the Fifth Circuit, which denied a certificate of appealability. *See Clark v. Johnson*, 202 F.3d 760 (5th Cir. 2000). Mr. Taylor petitioned for a writ of certiorari, which was denied on October 2, 2000. *See Clark v. Johnson*, 531 U.S. 831 (2000).

Section 848(q)(8) additionally commands that federally-appointed habeas counsel "*shall* . . . also represent

the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." *Id.* (emphasis added). Mr. Taylor submitted a clemency application on behalf of Mr. Clark to the Texas Board of Pardons and Paroles and sought a reprieve from the Governor of Texas. *See* App. 21a. As part of the clemency process, counsel complied with several requests for information from the Texas Board of Pardons and Paroles and reached an agreement with the Lubbock County District Attorney to perform DNA testing. *See id.* Mr. Taylor's efforts ended on January 9, 2001, when the Board denied clemency, Governor Perry turned down the request for a reprieve and Mr. Clark was executed. *See* App. 22a.

On February 13, 2001, Mr. Taylor submitted his voucher and timesheets to the district court, seeking compensation and reimbursement of expenses for his efforts to secure clemency for Mr. Clark. *See* App. 2a, 21a. Mr. Taylor received no funds from any source for the clemency representation (*see* App. 22a), as the State of Texas does not provide for the appointment of counsel for clemency proceedings. On April 6, 2001, the federal district court issued an order denying compensation, citing a March 2001 decision from another district, *Chambers v. Johnson*, 133 F. Supp. 2d 931 (E.D. Tex. 2001). *See* App. 11a. *Chambers* holds that an appointment of counsel under §848(q) does not include state clemency representation. *See id.*, 133 F. Supp. 2d at 934-36.

Mr. Taylor appealed. The United States Court of Appeals for the Fifth Circuit affirmed in a published opinion, holding that an appointment under §848(q) does not encompass state clemency proceedings. *See* App. 8a.

Deciding the case without argument, the court recognized that this was a case of first impression in the Fifth Circuit, but noted that the Circuit "has continued to construe §848(q)(4)(B) narrowly." App. 7a (citing *Cantu-Tzin v. Johnson*, 162 F.3d 295, 298-99 (5th Cir. 1998)). The panel concluded "that the phrase 'proceedings for executive or other clemency as may be available to the defendants' as it appears in §848(q)(8) does not apply to state clemency proceedings." App. 8a. The court failed to cite or address the contrary decision from the Eighth Circuit, *Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993), or the published district court decisions that follow *Hill*. *See* App. 8a.

Mr. Taylor sought rehearing en banc, which was denied on January 28, 2002. *See* App. 16a.

2. ***Soria v. Johnson (In re: Harris and Taylor)***

Juan Soria was convicted of capital murder and was sentenced to death. On December 17, 1998, the United States District Court appointed petitioners Gary A. Taylor and William S. Harris to represent Mr. Soria, pursuant to 21 U.S.C. §848(q). *See* App. 26a.

Mr. Taylor and Mr. Harris filed a federal petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254, which was denied by the district court on March 25, 1999. *See* App. 26a. The court of appeals denied a certificate of appealability on March 16, 2000. *See Soria v. Johnson*, 207 F.3d 232 (5th Cir. 2000). On June 14, 2000, counsel filed a petition for a writ of certiorari and a motion for stay of execution with this Court. *See* App. 26a. In the meanwhile, the state obtained an execution date of July 26, 2000. *See* App. 27a.

Counsel prepared an extensive application for clemency to the Texas Board of Pardons and Paroles, which included a psychological assessment. *See id.* Mr. Soria had deteriorated mentally in the year and a half prior to his scheduled execution. He was repeatedly transferred from Texas's death row to the psychiatric unit of a prison in Richmond, Texas. *See id.* As the execution date approached, Mr. Soria had more than 100 different self-inflicted wounds on his body. *See id.* Counsel obtained Mr. Soria's medical files and sought to have him evaluated by an expert, Dr. Richard C. Schmitt, so that information about Mr. Soria's significant mental illness could be included in the clemency application. *See id.* Dr. Schmitt reviewed the records but was unable to meet with Mr. Soria due to a prison transfer. *See* App. 27a-28a. The clemency application was filed on July 5, 2000, and was denied. *See id.*

As they prepared the clemency application, counsel believed that Mr. Soria was competent to be executed. *See id.* The State of Texas apparently had some concerns about his competency and, on July 17, 2000, prosecutors filed a motion with the state court to have Mr. Soria examined by a psychologist. *See* App. 28a. On July 19, 2000, a hearing was held on the motion, and Mr. Harris agreed to the evaluation. *See id.* Co-counsel, Mr. Taylor, then traveled to the prison and met with Mr. Soria, who agreed to cooperate with both the state's expert and Dr. Schmitt. *See id.* Counsel also discussed the upcoming execution with Mr. Soria and was still of the opinion that Mr. Soria was competent to be executed. *See id.* Afterwards, however, Mr. Soria refused to cooperate with

either psychologist and no evaluation was conducted. *See id.*

Shortly thereafter, Mr. Soria's sister informed counsel that Mr. Soria had deteriorated further and she asked that another attempt be made to have Dr. Schmitt examine him. *See id.* On July 25, Mr. Harris and Dr. Schmitt saw Mr. Soria, who was covered with razor cuts. *See* App. 29a. Following an interview, Dr. Schmitt concluded that Mr. Soria was not mentally competent to be executed. *See id.* That same day, this Court denied Mr. Soria's application for a stay of execution and petition for a writ of certiorari in his habeas corpus case, with two justices dissenting from the denial of the stay. *See Soria v. Johnson*, 530 U.S. 1286 (2000).

A motion to determine competency to be executed was filed in state court the next morning, July 26, 2000, and pleadings were filed with the Texas Court of Criminal Appeals, the U.S. Court of Appeals for the Fifth Circuit, and this Court. *See* App. 29a. Relief was denied and Mr. Soria was executed that evening. *See id.*; *In re Soria*, 530 U.S. 1287 (2000).

Pursuant to §848(q), Mr. Harris and Mr. Taylor each sought compensation from the district court for the clemency and competency representation. The district court authorized payment to Mr. Harris. *See* App. 13a-14a. Mr. Taylor submitted his own voucher. *See* App. 14a. On November 3, 2000, the district court *sua sponte* ordered Mr. Harris to show cause why the court should not vacate its previous approval of his fees, and ordered Mr. Taylor to show cause why the court should not disapprove his voucher. *See* App. 13a. Counsel filed their response, with

details of their clemency and competency representation, and explained that §848(q) requires appointed counsel to continue to represent their client in all available clemency and competency proceedings. *See* App. 25a-32a. They pointed out that the State of Texas does not provide funds for clemency or competency representation. *See* App. 30a. On April 9, 2001, the district court issued an order denying compensation to Mr. Taylor, vacating the prior payment to Mr. Harris, and ordering Mr. Harris to refund his fees. *See* App. 14a. The court characterized all of the work as state clemency representation and found that, as a matter of law, it was not part of an appointment under §848(q), citing *Chambers*. *See* App. 13a-14a.

Petitioners appealed this ruling. On July 23, 2001, the court of appeals dismissed the appeal for lack of jurisdiction. *See* App. 10a. On January 28, 2002, however, the panel granted rehearing, vacated the order of dismissal, and affirmed the district court. Applying the circuit's earlier ruling in *Clark*, the panel ruled as a matter of law that §848(q) does not authorize state clemency and competency representation. *See* App. 10a. As in *Clark*, the panel failed to acknowledge the Eighth Circuit's contrary holding in *Hill*.

REASONS FOR GRANTING THE PETITION

1. The Fifth Circuit's erroneous interpretation of 21 U.S.C. §848(q) conflicts with the ruling of the Eighth Circuit and several district courts.

a. Section 848(q) plainly requires the appointment of counsel for clemency and competency proceedings.

In 1988, Congress passed the Anti-Drug Abuse Amendments Act ("ADAA"), Pub. L. 100-690, Title VII, §7001, 102 Stat. 4393-94, which establishes a right to counsel for state death-sentenced prisoners who seek federal habeas corpus review. In addition, the statute plainly provides for counsel in clemency and competency proceedings, which typically arise at the conclusion of the federal habeas corpus litigation. Congress made clear that people sentenced to death should not be abandoned by their lawyers as an execution date nears. Thus, contrary to the Fifth Circuit's view, appointed counsel – who are already familiar with the client and the case – must continue their representation.

In construing §848(q), this Court must "begin, as always, with the language of the statute." *Duncan v. Walker*, 533 U.S. 167, 172 (2001) (citations omitted). The 1988 Act added 21 U.S.C. §848(q)(4)(B), which provides,

> "In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in

> accordance with paragraphs (5), (6), (7), (8), and (9)."

The referenced paragraph 8 states, in turn:

> "*Unless replaced by similarly qualified counsel . . . , each attorney so appointed* shall represent the defendant through every subsequent stage of available judicial proceedings, . . . and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, *and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.*"

21 U.S.C. §848(q)(8) (emphasis added). Another paragraph, §848(q)(10)(A), furnishes compensation "to attorneys appointed under this subsection" at a fixed hourly rate. Subsection 848(q)(10)(B) provides expenses for other reasonably necessary services.

Under the plain language of this statute, appointed and compensated counsel must be afforded to a capital habeas corpus petitioner for state clemency representation, and for state and federal competency proceedings. Section 848(q)(4)(B) requires the appointment of counsel in any capital proceeding under §2254 – meaning in any capital federal habeas corpus petition filed by a state prisoner – and in the related proceedings described in §848(q)(8). Section 848(q)(8) provides that, once appointed, the habeas corpus lawyer *shall* represent the capital defendant in such "proceedings for executive or other clemency as may be available to the defendant." This duty must encompass *state* clemency proceedings because

the statutory right to counsel includes, without limitation, "such" clemency proceedings "as may be available" and the *only* clemency proceedings "available" to a defendant convicted in a state court are those that are provided by the state. Likewise, §848(q)(8) requires that counsel represent the defendant in "such competency proceedings . . . as may be available. . . . " The statute does not limit this right to counsel to proceedings in a federal forum. Indeed, whether a person is competent to be executed may involve issues of both state and federal law and the federal issues must, in most instances, first be presented to the state courts. *See* 28 U.S.C. §2254(b)(1).

Where, as here, the language of the statute is clear, that language must control. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, the Eighth Circuit correctly ruled in *Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993) that "[t]he plain language of §848(q) evidences a congressional intent to insure that indigent state petitioners receive 'reasonably necessary' competency and clemency services from appointed, compensated counsel." *Id.* at 803.

There are other reasons why the Eighth Circuit was correct. The statute expressly refers to "proceedings for executive or *other* clemency . . . ." §848(q)(8) (emphasis added). Federal clemency is purely executive.[1] But a

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[1] *See* U.S. CONST., art. II, §2, cl. 1. The federal clemency power is not even subject to modification by the legislative branch. *See Schick v. Reed*, 419 U.S. 256, 266 (1974); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

number of states have forms of clemency that are "other" than executive. Chief Justice Rehnquist has noted that "[t]he original States were reluctant to vest the clemency power in the executive." *Herrera v. Collins*, 506 U.S. 390, 414 (1993). Although the clemency power "has gravitated toward the executive over time" (*id.*), a number of states permit the legislative or judicial branches to control or participate in the clemency process.[2] The inclusion of the phrase "other clemency" plainly shows that Congress intended §848(q) to include state clemency proceedings. Courts must "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (citation omitted). Moreover, limiting the statute to federal clemency would make the word "other" superfluous. A court must "give effect, if possible, to every clause and word of a statute." *Duncan*, 533 U.S. at 174 (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (internal quotations omitted)); *(Terry) Williams v. Taylor*, 529 U.S. 362, 404 (2000) (same).

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[2] A single example may suffice. In Connecticut, the clemency power is reposed in the legislative, rather than the executive, branch. As that state's highest court has recognized, "[i]n Connecticut, the pardoning power is vested in the legislature . . . which has delegated its exercise to the board of pardons." *McLaughlin v. Bronson*, 537 A.2d 1004, 1006-07 (Conn. 1988) (citations omitted).

b. The circuits are split.

The erroneous rulings of the Fifth Circuit directly conflict with decisions from the Eighth Circuit and several district courts. This Court should grant review to resolve the split in authority.

As already noted, in *Hill v. Lockhart*, the Eighth Circuit found that the plain language of §848(q) affords clemency and competency counsel to state prisoners sentenced to death. *See Hill*, 992 F.2d at 803. Although that circuit would require counsel to follow certain procedural steps,[3] the opinion can only be read to hold that §848(q)

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[3] The court noted that for counsel's services to be considered "reasonably necessary," the district court must be satisfied that the underlying federal habeas proceeding is non-frivolous and that state law provides no funds for clemency or competency representation. Counsel should also seek permission prior to beginning the work. In discussing what services are "reasonably necessary," *Hill* drew from the language of former §848(q)(10), which provided:

> "Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9)."

See ADAA, Pub. L. 100-690, Title VII, §7001, 102 Stat. 4394. However, after *Hill* was decided, §§848(q)(9) and (10) were amended by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. 104-132, which created §§848(q)(10)(A) and (B), splitting the provisions for counsel from the provisions for

establishes the right to appointed counsel in clemency and competency proceedings, even when those proceedings are convened under the authority of the state. Two district courts outside of Texas have acknowledged the split and have followed *Hill*. *See Lowery v. Anderson*, 138 F. Supp. 2d 1123, 1125 (S.D. Ind. 2001) (granting a motion for appointment of counsel for state clemency representation, finding "the plain language of §848(q)(8) to be controlling here, consistent with the straightforward and persuasive reasoning of the Eighth Circuit in *Hill*."); *Strickler v. Greene*, 57 F. Supp. 2d 313, 316 (E.D. Va. 1999) (concluding that *Hill* is "the better-reasoned appellate decision on this topic" and agreeing that "the statutory text authorizes compensation" for clemency representation.) Further, though it is not a judicial decision, the Fourth Circuit affirmatively instructs appointed capital habeas corpus counsel that it compensates for "all time spent representing the client on appeal, after filing of the notice through preparation for writ of certiorari, and completion of any applicable clemency proceedings." *Payment of Court-Appointed Counsel in Appeals Arising Out of State Capital Convictions*, available at: http://www.ca4.uscourts.gov (last visited April 11, 2002).

"investigative, expert, and other reasonably necessary services." The current version of §§848(q)(10)(A) and (B) is reproduced, *infra*, at App. 19a-20a. Under the amended statute, it is clear that the "reasonably necessary" limitation applies only to the "investigative, expert and other" services specified in §848(q)(9) and (q)(10)(B). The limitation no longer applies to compensation for the lawyer's time, which is now addressed separately in §848(q)(10)(A).

The Fifth Circuit reached the opposite conclusion. Instead of following the plain language of the statute, the court in *Clark* decided that §848(q)(4)(B) should be construed narrowly. *See* App. 7a. The *Clark* panel revisited an earlier Fifth Circuit case, *Sterling v. Scott*, 57 F.3d 451 (5th Cir. 1995), which held that §848(q) does not provide for the appointment of counsel to return to state court to raise unexhausted claims. Although *Sterling* did not involve the precise question in *Clark*, the panel found *Sterling*'s narrow reading of §848(q) "instructive." *See* App. 7a. It concluded that §848(q)(8) "does not apply to state clemency proceedings." App. 8a. For its part, the court of appeals in *Soria* acknowledged that before it was the question of representation in competency as well as clemency proceedings. *See* App. 10a. Nevertheless, the panel determined that it was bound by *Clark* and simply affirmed the district court, without distinguishing competency from clemency representation. *See id.*[4]

In addition to the Fifth and the Eighth Circuits, the Eleventh Circuit *may* have determined that §848(q) does not require the appointment of federal counsel to raise an unexhausted competency claim in state court. *See In re Lindsey*, 875 F.2d 1502 (11th Cir. 1989). The holding in *Lindsey* is not entirely clear because that court first ruled

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[4] The panel could have, for example, ruled that counsel should be compensated for their federal court efforts involving competency. Two circuits (including the Fifth) have found that §848(q) provides the right to counsel for federal (not state) successor petitions involving competency to be executed. *See Weeks v. Jones*, 100 F.3d 124, 128 (11th Cir. 1996); *Barnard v. Collins*, 13 F.3d 871, 878-79 (5th Cir.), *cert. denied*, 510 U.S. 1102 (1994).

that no properly filed habeas corpus petition was before the federal court, and thus no right to federally-appointed counsel under §848(q) could have attached at all. *See id.* at 1506. Even so, the *Lindsey* court went on to declare that it could not agree that " 'competency proceedings and proceedings for executive or other clemency,' as used in subsection 848(q)(8), encompass . . . any proceedings convened under the authority of a State." *Id.*

In sum, there is no doubt that the Fifth and the Eighth Circuits have reached opposite conclusions about the requirements of §848(q). There is no way to reconcile the two holdings. And although *Lindsey*'s holding is difficult to determine, it appears that the Eleventh Circuit is aligned with the Fifth. The Fourth Circuit has administratively aligned itself with the Eighth, and with district courts in Virginia and Indiana.

The split between the Fifth and Eighth Circuits will not be resolved without direction from this Court. On both sides of the divide are jurisdictions that regularly carry out the death penalty, particularly if one also takes into account the rulings of the district courts in Indiana and Virginia and the Eleventh Circuit's decision in *Lindsey*. Here is the tally of the states for which courts have ruled whether death-sentenced prisoners have a right to federally-appointed counsel in state clemency and competency proceedings, together with the number

of people (in parentheses)[5] that these states have executed in the modern, post-*Furman*[6] era:

Right to counsel under §848(q)	*No right to counsel under §848(q)*
Virginia (85)	Texas (265)
Missouri (57)	Florida (51)
Arkansas (24)	Georgia (29)
Indiana (9)	Louisiana (26)
Nebraska (3)	Alabama (23)
	Mississippi (4)

This list contains eight of the ten states that have executed the most people in the modern era; only Oklahoma (50) and South Carolina (25) are not represented. Thus, there is no reason to wait for the issue to percolate in the lower courts because the most active death penalty jurisdictions have already weighed in. Where Congress has plainly required counsel to be provided for state clemency and competency representation, the availability of federally-appointed counsel ought not depend upon whether a person faces death in Virginia, Missouri or Arkansas, instead of Texas, Florida or Georgia. This Court should grant review and resolve the split in authority.

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[5] *See* Death Penalty Information Center, *Number of Executions By State Since 1976*, available at: http://www.deathpenaltyinfo.org/dpicreg.html (last visited April 19, 2002). The data are current as of April 18, 2002.

[6] *See Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 227 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

2. The Fifth Circuit's narrow reading of 21 U.S.C. §848(q) runs counter to the principles of *McFarland v. Scott*.

In *McFarland v. Scott*, 512 U.S. 849 (1994), this Court held that the language and purpose of §848(q)(4)(B) establish that the statutory right to counsel encompasses legal representation in preparing a capital federal habeas corpus petition. *See id.* at 856. Section 848(q) should be construed "in light of its related provisions" to "give[ ] meaning to the statute as a practical matter." *Id.* at 854, 855. Emphasizing the importance of ensuring appointed counsel to indigent defendants in capital proceedings, "Congress' provision of a right to counsel under §848(q)(4)(B) reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of 'the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.' " *Id.* at 855 (quoting 21 U.S.C. §848(q)(7)). Examining the express language of the statute and informed by these considerations, the Court concluded that a "post conviction proceeding" within the meaning of §848(q)(4)(B) is commenced by filing a motion for appointment of counsel. *See id.* at 856-57. In the cases at bench, however, the circuit ignored the principles set forth in *McFarland* and failed to give practical meaning to the statute.

In *Clark*, the Fifth Circuit – without citing to *McFarland* – applied a self-derived rule that §848(q) must be construed narrowly. *See* App. 7a. But neither *McFarland* nor any circuit decision stands for the proposition that

§848(q), in contrast to all other statutes, must be construed narrowly.[7] Had the Fifth Circuit panel in *Clark* followed *McFarland*, it would have focused on the plain language of §848(q) and sought to give practical meaning to the statute as a whole. The court would have construed §848(q) in light of its purpose, which is to ensure adequate and uninterrupted legal representation for capital defendants in unique and complex proceedings.

Clemency is a critical part of our criminal justice system, and is particularly vital when the state seeks to take a human life. Clemency is "an act of grace" (*United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833)), or an exercise of mercy or justice; it is "the 'fail safe' in our criminal justice system." *Herrera v. Collins*, 506 U.S. 390 at 415 (citation omitted). As a discretionary, fail safe measure, clemency is typically sought "downstream" from state and even federal habeas corpus litigation. It is "traditionally available to capital defendants as a *final* and alternative avenue of relief." *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 284 (1998) (Opn. of Rehnquist, C.J.) (emphasis added). The procedures of the Texas Board of

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[7] *Cantu-Tzin v. Johnson*, 162 F.3d 295 (5th Cir. 1998), purportedly followed by the court below, does not establish any such general rule. In *Cantu-Tzin*, the Fifth Circuit declined to appoint counsel and stay an execution because the federal habeas corpus petition was filed beyond the limitations period, tolling did not apply, and the petitioner was deliberately dilatory. *See* 162 F.3d at 298-300. Thus said the circuit – over a dissent – no purpose would be served by the appointment. *See id.* But the question in *Cantu-Tzin* was in no way related to that presented here and *Cantu-Tzin* cannot legitimately be read to hold that §848(q) must be narrowly construed, without regard to the statute's plain meaning or purpose.

Pardons and Paroles, for example, set the filing deadline for commutation in reference to the scheduled execution date, and not in reference to the date of conviction. *See* TEX. ADMIN. CODE §143.57(b) (commutation application must be delivered to the Board not later than 21 days before the scheduled execution). Given clemency's function as a fail safe procedure that is generally sought late in the process, clemency representation is logically part of a system of the appointment of counsel for federal habeas corpus and related proceedings.

Likewise, proceedings to determine competency to be executed are also essential to a system that seeks to impose the ultimate sanction. "[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 409-410 (1986). As this Court has recognized, "the issue of sanity is properly considered in proximity to the execution." *Herrera*, 506 U.S. at 406; *see also Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) (upholding the lower court's ruling that the claim of incompetency to be executed was not a successive habeas corpus petition where the issue was raised earlier but was not then ripe for adjudication). The issue does not typically even arise until federal habeas counsel has already been appointed and has been working with the habeas corpus petitioner.

Soria shows why federally-appointed counsel must provide competency representation. Mr. Soria's mental health deteriorated as the execution date neared, and the *state* filed a motion for a psychological evaluation just nine days before the scheduled execution. At that point, only previously-appointed counsel were in a position to

provide legal assistance for Mr. Soria.[8] It would have been wholly improper to force Mr. Soria – who was then seriously mentally ill – to represent himself on the state's motion or, for that matter, to require him to raise and litigate a *Ford* claim on his own in the few days before his scheduled execution. Surely Congress did not intend such an absurd and unconscionable result.

Had the Circuit sought to give meaning to the entire statute, it would have determined that affording counsel for competency and clemency proceedings serves the essential purpose of §848(q). Through the plain language of the statute, Congress affirmed that a defendant should continue to be represented by counsel as an execution date nears. Clemency and competency proceedings are unique and important, requiring highly skilled legal assistance. Clemency applications are often intertwined with the merits of the underlying habeas corpus

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[8] As Mr. Taylor and Mr. Harris told the district court,

> "In clemency and competency matters, counsel is working usually within days and even, as this case, hours of an execution. The factual basis of the claims are more current and must be developed in large part from events and circumstances that have arisen since the habeas process was concluded. Time is of the essence in this situation and, many times, the nature and extent of such representation cannot be anticipated. Such is especially so in circumstances such as the instant case where in the condemned prisoner's mental status deteriorated on an hourly or daily basis."

App. 31a.

litigation,[9] requiring the assistance of counsel who have knowledge of both the "complex nature" of post-conviction practice (*see McFarland*, 512 U.S. at 855; §848(q)(7)) and a command of the facts of the individual case. As *Soria* demonstrates, it is only reasonable and realistic that competency proceedings are handled by counsel who already know the client. A competency challenge may be especially demanding because it requires a coordinated effort in both state and federal courts. However, instead of looking at the plain language of the law, informed by its purpose, the Fifth Circuit set out to interpret §848(q) as narrowly as it could. This construction is counter to the principles of *McFarland*, ignores the purposes of the statute, and ought to be reviewed by this Court.

3. The issue is exceptionally important.

The Fifth Circuit's ruling is now the law in capital proceedings that arise in Texas, Mississippi and Louisiana. As the table displayed earlier in the petition (*supra* at 17) demonstrates, all three are death penalty states, though the panel's published opinion would merit review even if it applied solely to Texas. Texas has executed more people than any other state in the post-*Furman* era. It has

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[9] *See, e.g., Herrera v. Collins*, 506 U.S. at 411-12 ("Clemency . . . is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."); *Thompson v. Oklahoma*, 487 U.S. 815, 876 (1988) (Scalia, J., joined by Rehnquist, C.J., and White, J.) ("The Governor of Oklahoma, who can certainly recognize a frustration of the will of the citizens of Oklahoma more readily than we, would certainly have used his pardon power if there was some mistake here.")

put 265 individuals to death, fully one-third of all executions in the United States since 1976.[10] Texas has already administered lethal injections to nine people in the first four months of this year, and it has eleven more executions scheduled between April 30 and June 26.[11]

Without the right to federally-appointed counsel, many indigent people will go to their deaths without seeking clemency, for no other reason than they cannot afford to hire a lawyer to make a final plea for mercy and grace, and indigent but incompetent inmates may be executed. Of the eleven states listed in the table in this petition, only Florida provides a statutory right to counsel in clemency and competency proceedings.[12] Some

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[10] *See Number of Executions By State Since 1976, supra* note 5.

[11] *See* Death Penalty Information Center, *Upcoming Executions*, available at: http://www.deathpenaltyinfo.org/executionalert.html (last visited April 19, 2002).

[12] *See* FLA. STAT. §925.035(4) (providing funds up to $1,000 for clemency representation); FLA. STAT. §925.036; *Remeta v. Florida*, 559 So.2d 1132 (Fla. 1990) (courts have authority to compensate beyond the $1,000 cap); *see also* FLA. STAT. §922.07(1) (requiring appointment of counsel if the Governor is informed that a defendant *may* be incompetent to be executed). Counsel have located no statutes that provide for compensation of counsel in clemency and competency proceedings in the other ten states. In *Strickler v. Greene*, the district court noted that Virginia does not compensate counsel for clemency representation. *See id.*, 57 F. Supp. 2d at 314. The court in *Lowery v. Anderson*, 138 F. Supp. 2d at 1125, made the same observation about Indiana law.

Lawyers in a public defender office or other publicly-funded organization may provide clemency or competency representation pursuant to contract or agreement, but there does not appear to be a right under state law to such

lawyers appointed under §848(q) may prepare clemency applications or petitions raising competency claims *pro bono*, but others will not. Many death row inmates are poorly educated,[13] retarded,[14] mentally ill,[15] or juveniles,[16] wholly unable to marshal the materials necessary to file their own clemency applications or to litigate the

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representation in these other ten states, nor would any such contract or agreement help defendants represented by appointed private counsel.

[13] The U.S. Department of Justice reports that 14.4% of those on death row have an education up to the eighth grade or less. Another 37.3% went beyond eighth grade but failed to graduate from high school. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Capital Punishment 2000*, Tbl. 7 (Dec. 2001), available at: http://www.ojp.usdoj.gov/bjs/abstract/cp00.htm (last visited April 19, 2002).

[14] *See* The Constitution Project, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY, at 12 (2001) (reporting that persons with mental retardation make up between 12 and 20 percent of those on death row).

[15] *See* Dorothy O. Lewis, et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 840 (1986) (finding, in a study of fifteen adult death row inmates, that 40% (six) were chronically psychotic, evidencing symptoms such as loose, illogical thought processes, delusions and hallucinations); Nat'l Mental Health Assoc., *Death Penalty and People With Mental Illness*, available at: http://www.mha-mi.org/policy44.html (last visited April 19, 2002) (estimating that between 5 and 10 percent of people on death row have a serious mental illness).

[16] Seventy-eight defendants who were seventeen years or younger at the time of the crime are now serving death sentences in the United States. *See Capital Punishment 2000, supra* note 13, Tbl. 8. Their entry into the criminal justice system at a young age limits their education, development and access to resources.

question of their own competency to be executed. They will be executed without clemency or competency review.

We do not have to speculate to know that this is true.

Emerson Edward Rudd was represented by counsel appointed under §848(q). After his federal habeas corpus petition was denied and this Court denied certiorari, his counsel asked to clarify that his order of appointment included state clemency representation. The district court ruled that §848(q) does not provide compensation for state clemency applications. *See Rudd v. Johnson*, 2001 U.S. Dist. Lexis 18315 & 18798 (N.D. Tex. 2001). This Court and the Fifth Circuit denied stays of execution. *See Rudd v. Cockrell*, 122 S.Ct. 585 (2001); *Rudd v. Cockrell*, No. 01-11437 (5th Cir. Nov. 14, 2001). Mr. Rudd went to his death on November 15, 2001, without an application for clemency being filed with the Texas Board of Pardons and Paroles.

Likewise, the state courts in Texas denied Jeffrey Caldwell's request for appointment of counsel to assist him in developing his claim of incompetency to be executed. The Court of Criminal Appeals ruled that there is no right to counsel under Texas law, that the burden is on the inmate himself to come forward with a substantial showing of incompetence, and that Caldwell did not make the requisite showing. *See Ex parte Caldwell*, 58 S.W.3d 127, 130-31 (Tex. Crim. App. 2000). Caldwell filed a federal habeas corpus petition raising the *Ford* claim, but the federal district court deferred to the state court's findings and denied relief; the Fifth Circuit denied a

certificate of appealability and refused to stay the execution. *See Caldwell v. Johnson*, 226 F.3d 367, 372-74 (5th Cir. 2000). Mr. Caldwell was executed on August 30, 2000.

Clemency and competency proceedings are critical to a system that imposes the death penalty. Clemency is particularly important given recent additional restrictions on federal habeas corpus.[17] Thus, in *Herrera v. Collins*, this Court rejected a free-standing assertion of actual innocence, but underscored that Mr. Herrera was not "left without a forum to raise his actual innocence claim." *Id.*, 506 U.S. at 411. He could file a state application for clemency, a process "deeply rooted in our Anglo-American tradition of law." *Id.* at 411-12. Indeed there is rich irony in the rulings below. Although the Fifth Circuit held that there is no right to counsel for clemency review, the same court has repeatedly ruled that it is not a violation of the Constitution to execute an innocent Texas death row inmate, pointing out that the person may apply for clemency to the Texas Board of Pardons and Paroles. *See Graham v. Johnson*, 168 F.3d 762, 788 (5th Cir. 1999), *cert. denied*, 529 U.S. 1097 (2000); *Lucas v. Johnson*, 132 F.3d 1069, 1074-76 (5th Cir.), *cert. dismissed*, 524 U.S. 965 (1998). But if clemency is essential to our system of justice, the availability of that remedy must depend upon the merits of the clemency case, rather than upon the

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[17] The AEDPA added a statute of limitations (*see* 28 U.S.C. §2244(d)), restrictions on successive petitions (*see* 28 U.S.C. §2244(b)), and new requirements of deference (*see* 28 U.S.C. §2254(d)). These provisions constrict the opportunity of state prisoners to receive federal habeas corpus relief. For many death-sentenced prisoners, clemency may provide the only available procedure to avoid execution.

utter chance that an indigent inmate will find a volunteer lawyer willing to investigate and file a clemency application in the first place.

Also essential to our system of justice is the principle that we do not execute the mentally incompetent. As this Court said in *Ford v. Wainwright*, the practice of executing a prisoner who has lost his sanity "consistently has been branded 'savage and inhuman.' " *Ford*, 477 U.S. at 407 (quoting 4 W. Blackstone, COMMENTARIES 24-25 (1769)). There are well-established reasons why. The practice offends humanity, does not promote deterrence, fails to serve the purpose of retribution, and does not allow the defendant an opportunity to prepare for his or her death. *Id.* at 407-08 (citations omitted). A person who lacks the capacity to understand the penalty of death or the reasons for its imposition will by definition be incapable of raising and litigating a *Ford* claim. As a dissenting judge pointed out in *Ex parte Caldwell*, "[i]f an applicant is, in fact, incompetent, filing the required motions *pro se* is an impossibility; the applicant will have neither the knowledge of the right nor the means to assert it." *Id.*, 58 S.W.3d at 131 (Johnson, J., dissenting). If Congress's statute is read to eliminate the right to appointed counsel in competency proceedings, incompetent defendants will be executed without any meaningful judicial review.

CONCLUSION

Petitioners respectfully request that the Court issue a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

(Filed January 2, 2002)

UNITED STATES COURT OF APPEALS
for the Fifth Circuit.

No. 01-10573

JACK WADE CLARK,

Petitioner,

VERSUS

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

GARY A. TAYLOR,

Appellant.

Appeal from the United States District Court
For the Northern District of Texas, Lubbock

Before KING, Chief Judge, and JOLLY and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

The district court granted Gary Taylor's motion to appoint him to represent Jack Wade Clark, a Texas prisoner who had been convicted of capital murder in 1991 and sentenced to death. With Taylor's assistance, Clark filed a 28 U.S.C. §2254 petition, which was denied by the district court. Both the district court and this court denied

Clark a certificate of appealability to appeal the district court's final judgment. Clark's petition to the Supreme Court for a writ of certiorari was also denied. *Clark v. Johnson*, 531 U.S. 831 (2000). The State of Texas executed Clark on January 9, 2001.

Following Clark's execution, Taylor submitted a CJA[1] voucher to the district court requesting compensation and reimbursement of expenses incurred in connection with a state clemency proceeding brought on Clark's behalf. The district court denied the voucher, adopting the reasoning set forth in *Chambers v. Johnson*, 133 F.Supp.2d 931 (E.D.Tex.2001), holding that 21 U.S.C. §848(q)(8) (relating to the payment of court appointed counsel in death penalty cases) did not authorize compensation for representation in state clemency proceedings.

Taylor filed a timely notice of appeal to this Court.

This Court ordered the parties to address whether a circuit court has appellate jurisdiction to review the district court's order denying reimbursement for activities by appointed counsel relating to state clemency matters. The State has informed the Court that it does not have any interest or role in this appeal and therefore does not intend to file a brief.

Appellate Jurisdiction

This Court must consider, *sua sponte* if necessary, whether appellate jurisdiction exists. *In re Kaiser Aluminum and Chemical Co.*, 214 F.3d 586, 589 (5th Cir.2000), *cert.*

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[1] Criminal Justice Act (CJA).

denied, 532 U.S. 919 (2001). As a court of limited jurisdiction, this Court has authority to hear appeals only from "final decisions" under 28 U.S.C. §1291, interlocutory decisions under 28 U.S.C. §1292, non-final judgments certified as final under Federal Rule of Civil Procedure 54(b), or some other non-final order or judgment to which an exception applies. *Briargrove Shopping Ctr. Joint Venture v. Pilgrim Enter., Inc.*, 170 F.3d 536, 538 (5th Cir.1999).

In general, a district court's order is an appealable final decision if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). In addition, the jurisprudential exception known as the collateral-order doctrine permits an appeal of a narrow group of interlocutory orders if the district court's ruling conclusively determines the disputed question, resolves an important issue that is completely separate from the merits, and cannot effectively be reviewed on appeal from a final judgment. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *United States v. Brown*, 218 F.3d 415, 420 (5th Cir.2000), *cert. denied*, 531 U.S. 1111 (2001).

At issue here is the district court's ruling that counsel was not entitled to compensation and reimbursement under §848(q) for expenses incurred in connection with Clark's state clemency proceeding. Whether the court has appellate jurisdiction to consider an appeal from the district court's order denying compensation under §848(q)(4)(B) is a question of first impression in this Court.

Taylor argues that the district court's order is reviewable as either a final order or as an appealable collateral order. We agree. Attorney fee decisions made at or after a final ruling on the merits are ordinarily appealable. *See Campanioni v. Barr*, 962 F.2d 461, 463 (5th Cir.1992); *Shipes v. Trinity Indus., Inc.*, 883 F.2d 339, 344 (5th Cir.1989) (discussing fees in an EEOC case); *Dardar v. Lafourche Realty Co.*, 849 F.2d 955, 959 (5th Cir.1988) (discussing fees in an APA case); *Ruiz v. Estelle*, 609 F.2d 118, 119 (5th Cir.1980) (discussing fees under the Civil Rights Act, 42 U.S.C. §1988). Taylor concedes that some courts have ruled that a district court's decision to reduce compensation under the CJA are non-appealable administrative decisions. Taylor maintains, however, that this case concerns an interpretation of a federal statute by a federal district judge, not an administrative decision about the appropriate amount of fees for an otherwise authorized activity.

On the other hand, the award of fees under §848(q) is not dependent upon the outcome of the case. §848(q)(10). The opposing party (the United States or State) does not receive notice that a fee determination will be made by the judge, and no adversary hearing is required. Nor does §848(q) expressly provide for appellate review.

The instant order fully and finally disposes of Taylor's request for reimbursement, an issue that is separate from the merits of the federal habeas corpus proceeding. The district court necessarily interpreted the meaning of "proceedings for executive or other clemency" under §848(q)(8) to exclude state clemency proceedings. Such a

decision is qualitatively different from approving or disapproving the amount of expenses reasonably and necessarily incurred by counsel as it definitively determines whether such services are compensable under the Act as a matter of law. We conclude therefore that under either theory this Court has appellate jurisdiction as to the district court's order.

Clemency Proceedings

Taylor argues that the plain language of §848(q) requires that counsel pursue state clemency proceedings and therefore that the federal court must compensate counsel for this representation.

This Court reviews a district court's interpretation of a federal statute *de novo. United States v. Rasco,* 123 F.3d 222, 226 (5th Cir.1997).

Section 848(q)(4)(B) authorizes the appointment of counsel in any post conviction proceeding under 28 U.S.C. §2254, seeking to vacate or set aside a death sentence, for any indigent defendant. §848(q)(4)(B). "[E]ach attorney so appointed shall represent the defendant through every subsequent stage of available judicial proceedings, . . . and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." §848(q)(8). Compensation

"shall be paid to attorneys appointed under this subsection." §848(q)(10)(A). Subject to certain amount limitations, fees and expenses paid for reasonably necessary, authorized services are also reimbursable. §848(q)(10)(B).

Whether the phrase "proceedings for executive or other clemency as may be available" includes state clemency proceedings for which counsel may be compensated is a question of first impression in this Court.

The Eleventh Circuit has held that an inmate under death sentence who has not exhausted all available state remedies is not proceeding under §2254 so as to be entitled to appointment of attorney under §848(q). *In re Lindsey,* 875 F.2d 1502, 1506-07 (11th Cir.1989) (denying mandamus to compel the appointment of counsel and a psychiatrist). The court explained that "the terms 'subsequent stage[s] of available judicial proceedings' and 'competency proceedings and proceedings for executive or other clemency,' as used in §848(q)(8), do not encompass within their meanings any proceedings convened under the authority of a State." *Id.* at 1506.

This Court favorably cited *Lindsey* in *Sterling v. Scott,* 57 F.3d 451 (5th Cir.1995), in which this Court held that an indigent state death row petitioner had no right to appointed and paid counsel under §848(q)(4)(B) for the purpose of exhausting his state post-conviction claims. *Id.* at 458. The court concluded in *Sterling* that §848(q)(8), which provides for the continued representation by the appointed attorney throughout "every subsequent stage of available judicial proceedings," did not allow counsel to continue his representation for the purpose of exhausting state remedies in state court. *Id.* at 457. The court read

§848(q)(8) in light of §848(q)(4)(B), which provides that the right to counsel applies only in connection with federal proceedings. *Id.* The court specifically agreed with *Lindsey* "that allowing the defendant to obtain federally appointed counsel for use in state postconviction habeas proceedings would have the effect of supplanting state-court systems for the appointment of counsel in collateral review cases." *Id.* at 458 (internal quotation and citation omitted).

In *Chambers v. Johnson*, the Eastern District of Texas followed the analysis in *Sterling* and *Lindsey* in denying counsel's claim for compensation and reimbursement for representing the petitioner in his state clemency proceedings. *Chambers*, 133 F.Supp.2d at 935-36. The district court below relied upon *Chambers* in denying counsel's claim for compensation and reimbursement.

Taylor argues that *Chambers* misapplies *Sterling* because clemency proceedings are fundamentally different from state post-conviction proceedings raising unexhausted claims. Taylor notes that clemency proceedings are not "judicial proceedings" and thus "wholly different from state *judicial* post-conviction proceedings."

As Taylor correctly argues *Sterling* does not address the precise question presented here, *i.e.*, whether representation in state clemency proceedings is required and compensable. The *Sterling* court's discussion of §848(q), and its reasons for not reading §848(q) broadly, are nevertheless instructive. The court has continued to construe §848(q)(4)(B) narrowly. *See Cantu-Tzin v. Johnson*, 162 F.3d 295, 298-99 (5th Cir.1998) (denying petitioner's request for the appointment of counsel under §848(q)(4)(B)

because the §2254 petition would have been undeniably time-barred). We conclude therefore that the phrase "proceeding for executive or other clemency as may be available to the defendants" as it appears in §848(q)(8) does not apply to state clemency proceedings. Accordingly, we affirm the Order of the district court.

APPENDIX B

(Filed January 28, 2002)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10575

JUAN SORIA,

Petitioner,

versus

GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

WILLIAM STANLEY HARRIS; GARY A. TAYLOR,

Appellants.

Appeal from the United States District Court for the
Northern District of Texas
(4:98-CV-1067)

Before EMILIO M. GARZA, DEMOSS, and BENAVIDES, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the appellants' motion for reconsideration, treated as a petition for panel rehearing, is GRANTED. Appellants' motion to vacate the order of

July 23, 2001 is GRANTED. The appellants' motion to reinstate the appeal is GRANTED.

In the order of dismissal filed July 23, 2001, this Court found that it had "no jurisdiction to entertain an appeal from the denial of request for compensation under [21 U.S.C.] § 848(q)(8)." The appellants filed a motion for reconsideration, which this Court ordered to remain pending until further notice.

Very recently, this Court issued a published opinion addressing the jurisdictional question at bar. *Clark v. Johnson*, ___F.3d___, 2002 WL 5590 (5th Cir. Jan. 2, 2002) (01-10573). As a question of first impression in this circuit, this Court concluded that we did indeed have appellate jurisdiction to consider an appeal from a district court's order denying compensation under § 848(q)(4)(B). *Id.* at *2. Accordingly, we vacate our prior order of dismissal and reinstate the appeal.

The next question is whether district court [sic] correctly concluded that § 848(q)(8) did not authorize compensation for attorneys in state clemency and competency proceedings. In *Clark*, this Court, construing the statute narrowly, concluded that the "phrase 'proceeding for executive or other clemency as may be available to the defendants' as it appears in § 848(q)(8) does not apply to state clemency proceedings." *Id.* at *4. We are bound by that decision and thus must affirm the district court's order in the instant case.

AFFIRMED.

APPENDIX C

(Filed April 6, 2001)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

JACK WADE CLARK, Petitioner, v. GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.	)	CIVIL ACTION NO. 5:98-CV-165-C

ORDER

The Court has considered Attorney Gary A. Taylor's request (CJA Voucher dated February 13, 2001) for compensation and reimbursement of expenses in connection with a state executive clemency proceeding sought on behalf of Petitioner, Jack Wade Clark. Adopting the reasoning set forth in *Chambers v. Johnson*, ___F.Supp.2d___, 2001 WL 252811 (E.D. Tex. March 8, 2001), attorney Taylor's claim for compensation and reimbursement or representing Clark in his State clemency proceedings is denied.

SO ORDERED.

Dated April 6, 2001.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

APPENDIX D

(Filed April 9, 2001)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JUAN SORIA, Petitioner, V. GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.	)	CIVIL ACTION NO. 4:98-CV-1067-C

ORDER

By Order dated November 3, 2000, Attorney Gary A. Taylor was ordered to show cause why his request for attorneys' fees and expenses incurred on behalf of Juan Soria in connection with State executive clemency proceedings should not be denied.

Further, Attorney William S. Harris was ordered to show cause why the Court should not vacate the prior approval of the attorneys' fees and expenses he expended for State clemency proceedings on behalf of Juan Soria and why the Court should not order a refund of any payments made to Attorney Harris for State clemency proceedings.

The Court has considered the Response to Show Cause Order Relating to Attorneys' Fees filed by Attorneys Taylor and Harris. Adopting the reasoning set forth

in *Chambers v. Johnson*, ___F.Supp.2d___, 2001 WL 252811 (E.D. Tex. March 8, 2001), the Court finds:

(1) Attorney Taylor's claim for compensation and reimbursement of expenses for representing Juan Soria in connection with the State clemency proceedings is denied.

(2) Pursuant to the post-audit conducted by this Court of Attorney Harris' CJA 30 voucher submitted on September 14, 2000, the prior approval of fees and expenses in connection with the State clemency proceedings is vacated.

(3) Attorney Harris shall refund attorneys' fees in the amount of $7,600.00 and expenses in the amount of $290.78.

It is, therefore, ORDERED:

(1) Attorney Taylor's claim for compensation and reimbursement of expenses (as shown by CJA 30 Voucher dated October 24, 2000) incurred in connection with his representation of Juan Soria in State clemency proceedings is denied.

(2) The prior approval of Attorney Harris' CJA 30 voucher submitted on September 14, 2000, is vacated, and Attorney Harris shall refund attorneys' fees in the amount of $7,600.00 and expense in the amount of $290.78, for a total of $7,890.78, within ninety (90) days from the date of this Order.

(3) Attorney Harris' refund shall be in the form of a cashier's check or firm check made payable to the Administrative Office of the United States Courts, and shall be delivered to Pam Murphy, Deputy-in-Charge, United States District Clerk's Office, United States Courthouse, 501 West 10th Street, Fort Worth, Texas 76102.

(4) After receipt of the refund from Attorney Harris, the Clerk's Office shall mail the refund check along with a certified copy of this Order to: Administrative Office of the United States Courts, P.O. Box 77062, Washington, D.C. 20013-7062.

SO ORDERED.

Dated April 9, 2001.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

APPENDIX E

(Filed January 28, 2002)

UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

No. 01-10573

JACK WADE CLARK,

Petitioner

v.

GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent

Gary A. Taylor,

Appellant

Appeal from the United States District Court
For the Northern District of Texas, Lubbock

ON PETITION FOR REHEARING EN BANC

(Opinion 1/2/02, 5 Cir., ___, ___ F.3d ___)

Before KING, Chief Judge, and JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel

Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss, Jr.
United States Circuit Judge

APPENDIX F

RELEVANT STATUTORY PROVISIONS

Title 21 U.S.C. §848(q) provides, in pertinent part:

"(4)(B) In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

* * *

"(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

"(9) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the

sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

"(10)(A) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125 per hour for in-court and out-of-court time. Not less than 3 years after April 14, 1996, the Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of Title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

"(10)(B) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration,

and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active circuit judge."

APPENDIX G

(Letterhead omitted)

February 13, 2001

Nancy Doherty
United States District Clerk
Attn: Kristy Weinheimer, Deputy in Charge
1205 Texas Avenue
221 George Mahon Federal Building
Lubbock, Texas 79401-4002

RE: Cause No. 98-CV-165-C: *Clark v. Johnson*

Dear Ms Weinheimer:

Please find enclosed my voucher and supporting documentation relating to my representation of Mr. Clark during the state clemency process, which I respectfully request be presented to Judge Cummings for his consideration. I believe the information submitted is self-explanatory, but if you or Judge Cummings have any questions, please do not hesitate to contact me at any time.

As I stated, this claim is for my services which were provided after the denial of the petition for writ of certiorari and in relation to seeking state clemency proceedings. I prepared and delivered a clemency application to the Texas Board of Pardons and Paroles and further sought a 30 day reprieve from Texas Governor Rick Perry. I complied with information requests from the general counsel for the Texas Board of Pardons and Paroles several times. Moreover, I was able to come to an agreement with the Lubbock County District Attorney wherein the evidence against Mr. Clark was submitted for DNA testing, at the State's expense. My representation ended at

approximately 5;00 p.m. on January 9, 2001, when Governor Perry turned down Mr. Clark's request for a reprieve. Mr. Clark was executed shortly after 6:00 p.m. that same day.

Please further inform Judge Cummings that I have received no funds from any source with relation to the services provided and I am not aware of Mr. Clark or anyone else receiving any such funds.

If you have any questions regarding these matters, please do not hesitate to contact me.

Sincerely,

/s/

Gary A. Taylor

GAT

Board Certified in Criminal Law
11319 Long Branch Rd.
Austin, Texas 78736

APPENDIX H

Criminal Justice Act Voucher submitted by Gary A. Taylor to the United States District Court for the Northern District of Texas in *Clark v. Johnson* *(In re: Taylor)*
[accompanying timesheets omitted]

BEST AVAILABLE COPY

CJA 30 (Rev. 3/95)

DEATH PENALTY PROCEEDINGS: APPOINTMENT AND AUTHORITY TO PAY COURT APPOINTED COUNSEL D 29332

1. JURISDICTION	2a. DISTRICT COURT DOCKET NO.	2b. COURT OF APPEALS DOCKET NO.	3. FOR (DISTRICT/CIRCUIT)
☑ DISTRICT COURT 2 ☐ COURT OF APPEALS 3	5:98-CV-165-C	98-41113	FIFTH CIRCUIT

4. LOC. CODE	5. CHARGE/OFFENSE (U.S. or other code citation)	6. CASE CODE
LAUNO	28 USC 2254	☒ D-1 ☐ D-2 ☐ D-3 ☐ D-4

7. IN THE CASE OF	8. PERSON REPRESENTED (Last Name, First Name, Middle Initial)
Jack Wade CLARK vs JOHNSON	Jack Wade Clark

9. PERSON REPRESENTED (Status)
1 ☐ DEFENDANT 2 ☐ HABEAS PETITIONER 3 ☐ APPELLANT 4 ☐ APPELLEE 5 ☒ OTHER CLEMENCY PETITIONER

10. COURT ORDER
O ☒ Appointing Counsel C ☐ Co-Counsel P ☐ Subs. for Panel Atty. F ☐ Subs. for Federal Public or Community Defender R ☐ Subs for Retained Atty.
Name of Prior Attorney: _____ Appt. Date _____ Voucher No. _____

Because the above-named "person represented" has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in item 11, who has been determined to possess the specific qualifications required by law, is appointed to represent this person in this case.

b) The attorney named in block 11 is appointed to serve as: ☒ Lead Counsel ☐ Co-Counsel
Name of Co-Counsel: KEVIN FINE
Appointment Date: _____ Voucher No.: _____

c) If you represented the defendant or petitioner in any prior proceeding, attach a listing of those proceedings and describe your role in each (e.g., lead counsel or co-counsel).

☐ d) Due to the expected length of this case, and the anticipated hardship on counsel in undertaking representation full-time for such a period without compensation, interim payments of compensation are approved pursuant to the attached order.

District Court Order & Appointment
Sig. of Presiding Judicial Officer or by Order of Court (Clerk/Deputy)

6/98
Date of Order

Nunc Pro Tunc Date

11. FULL NAME OF ATTORNEY/PAYEE (First Name, M.I., Last Name, Including Suffix) AND MAILING ADDRESS	13B. SOCIAL SECURITY NO. (Only provide per instructions)	13C. EMPLOYER I.D. NO. (only provide per instructions)
GARY A. TAYLOR PO BOX 90212 AUSTIN, TX 78709	453-29-6835	

13D. NAME AND MAILING ADDRESS OF LAW FIRM (Only provide per instructions)

12. WORK PHONE	13A. Does the attorney have the preexisting agreement (see instructions) with a corporation, including a professional corporation?
512 301-5100	☐ Yes ☒ No

CLAIM FOR SERVICES OR EXPENSES

14. STAGE OF PROCEEDING
Check the box which corresponds to the stage of the proceeding during which the work claimed at Item 15 was performed even if the work is intended to be used in connection with a later stage of the proceeding. CHECK NO MORE THAN ONE BOX. Submit a **separate** voucher for **each** stage of the proceeding.

CAPITAL PROSECUTION	HABEAS CORPUS	OTHER PROCEEDINGS
a ☐ Pre-Trial b ☐ Trial c ☐ Sentencing d ☐ Other Post Trial e ☐ Appeal f ☐ Petition for Supreme Court Writ of Certiorari	g ☐ Habeas Petition h ☐ Evidentiary Hearing i ☐ Dispositive Motions j ☐ Appeal k ☐ Petition for Supreme Court Writ of Certiorari	l ☐ [redacted] of Execution m ☐ Appeal of Denial of Stay n ☐ Petition for Writ of Certiorari to Supreme Court Regarding Denial of Stay o ☒ Other (Please attach description of Proceeding) CLEMENCY

15. HOURS. BY CATEGORY
Indicate the number of hours expended for the following categories of work performed during the stage of proceedings at Item 14:

On a separate sheet, provide a detailed description of the services performed, including the amounts of time spent and the dates on which the services were performed.

CATEGORIES	HOURS
a. In-Court Hearings	0
b. Interviews and Conferences with Client	7.80
c. Witness Interviews	—
d. Consultation with Investigators & Experts	—
e. Obtaining & Reviewing the Court Record	—
f. Obtaining and Reviewing Documents and Other Evidence	3.70
g. Consulting with Resource Center	
h. Legal Research and Writing	14.90
i. Travel	4.00
j. Other (Please Attach Description of Service)	

SUBTOTALS:
In Court (a) 0
Out of Court (b thru j) 30.40
x Hourly Rate ($ 125)

15A. TOTAL AMOUNT CLAIMED:
$ 3800.00

16. EXPENSES

TRAVEL, LODGING, MEALS ETC.	AMOUNT	OTHER EXPENSES	AMOUNT
Mileage 200 @ .30 =	60.00	CERT Record fee	9.50
		Copy Charges for Clemency Petition	111.32

16A. TOTAL TRAVEL EXP. $ 60.00
16B. TOTAL OTHER EXP. $ 120.82
17. GRAND TOTAL CLAIMED $ 3980.82

18. CERTIFICATION OF ATTORNEY/PAYEE FOR PERIOD _____ TO _____

F ☒ Final Payment I ☐ Interim Payment No _____
S ☐ Supplemental Payment

If yes, give details on additional sheets. _____

Has compensation and/or reimbursement for work in this case previously been applied for? ☐ YES ☒ NO
Has the person represented paid any money to you, or to your knowledge to anyone else, in connection with the matter for which you were appointed to provide representation? ☐ YES ☒ NO

I swear or affirm the truth or correctness of the above statements.

► _____
SIGNATURE OF ATTORNEY/PAYEE

► 2/13/01
DATE

APPROVED FOR PAYMENT

19. COMPENSATION	20. TRAVEL EXPENSE	21. OTHER EXPENSES	22. TOTAL AMOUNT APPROVED
$	$	$	$

23. SIGNATURE PRESIDING JUDICIAL OFFICER	24. DATE	25. JUDGE CODE

APPENDIX I

(Filed November 22, 2000)

[Page 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JUAN SORIA *Petitioner,*	§	
V.	§	CASE NO. 4:98-CV-1067-C
GARY JOHNSON, Director, Texas Dept. of Criminal Justice, Institutional Division, *Respondent.*	§	

RESPONSE TO SHOW CAUSE ORDER
RELATING TO ATTORNEYS FEES
WITH SUPPORTING BRIEF

TO THE HONORABLE SAM R. CUMMINGS, UNITED STATES DISTRICT JUDGE:

William S. Harris and Gary Taylor, Respondents, file this Response to Show Cause Order Relating to Attorney Fees with Supporting Brief.

Factual Summary

On December 3, 1998, pursuant to the requirements of TEX. CODE CRIM. PROC. ANN., Art. 11.071, §2(e) Respondent Harris filed a Motion and Brief for Appointment of Counsel. In this motion, Harris, who had represented

Juan Soria in the state habeas proceeding asked the Court to appoint counsel pursuant to 21 U.S.C. §848(q). Because Respondent Harris had several other death penalty cases pending which promised to occupy a substantial part of his time in the then immediate future, he requested the court appoint other counsel for Mr. Soria. The Court responded by appointing both Respondent Harris and Respondent Taylor to represent Soria pursuant to 21 U.S.C. §848(q) on December 17, 1998. Thereafter, as mandated by statute, both [Page 2] Harris and Taylor represented Soria until his execution on July 26, 2000.

A petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254 was filed on Soria's behalf on January 15, 1999. It was heard by the District Court on March 18, 1999, and the petition was denied by the District Court on March 25, 1999. On June 10, 1999, the Court approved payment of fees and costs to Harris totaling $11,127.17. On June 16, 1999, the Court approved fees and costs for Taylor totaling $10,543.39. The total fees and costs paid by the District Court for Soria in 1999 was $21,670.56.

Respondent gave Notice of Appeal to the United States Court of Appeals on April 23, 1999, and after the District Court denied Soria's application for Certificate of Appealability (hereafter COA) filed his Application for COA and Brief with the United States Court of Appeals for the 5th Circuit on September 8, 1999. The 5th Circuit denied COA on March 16, 2000. On June 14, 2000, Respondents filed on Soria's behalf a Petition for Writ of Certiorari and a Motion for Stay of Execution with the United States Supreme Court.

On July 26, 2000, despite prior assurances to Respondent Harris that the State would await outcome of the appeal to the Supreme Court before seeking an execution date, the State sought an execution date without notice to Soria's counsel. The State District Court obliged and set Soria's execution for July 26, 2000. Respondents received notice of this setting on April 14, 2000.

Following the clear mandate of the statute authorizing their appointment, Respondents investigated, prepared and filed a Petition for Clemency with the Texas Board of Pardons and Paroles on July 5, 2000. As a part of the investigation for the clemency petition, Respondents used money provided by Soria's extended family to hire a psychologist to evaluate Soria. This evaluation seemed particularly critical because for approximately a year and a half Soria had [Page 3] been mutilating himself and had been repeatedly transferred from Death Row to Jester IV, the psychiatric unit of the Institutional Division of the Texas Department of Criminal Justice, in Richmond, Texas. It is believed that Soria had more than 100 different self inflicted wounds upon his body during the final period of his incarceration in the TDCJ. Counsel had acquired Soria's voluminous medical file from the prison system and sought to have Soria evaluated because his mental state suggested that clemency should be extended as an act of mercy. Despite his self-mutilation, Soria, in his conversations with counsel appeared to meet the requirements for competency to be executed, and there was no expectation as of July 5, 2000, that a question regarding his competency would be raised. Dr. Schmitt was unable to meet with Soria because he was in the process of being transferred to a hospital unit on the day

Dr. Schmitt traveled to Livingston. That morning he had cut himself again. Dr. Schmitt had to file a report based upon review of Soria's medical records. Clemency was subsequently denied.

On July 17, 2000, the State filed a motion with the state district court to have Soria psychologically examined. Apparently, because of his hospitalizations and the mere fact that Respondents has [sic] sought to have Soria evaluated for the clemency proceeding, the state assumed that a challenge to Soria's competency to be executed was in the offing. On July 19, 2000, a hearing was held on the state's motion with Respondent Harris appearing by telephone from New Mexico where he was on vacation with his family. Harris agreed to the evaluation and informed the state court, for the record, that up to that time there had not been an indication that Soria lacked competency to be executed. Respondent Taylor then traveled to the Jester Unit in Richmond and discussed the agreement and the evaluations with Soria, who agreed to cooperate with both the State's expert, Dr. Randall Price, and the expert hired by Respondents, Dr. Richard C. Schmitt. At the same time, Taylor discussed the upcoming execution with Soria and was of [Page 4] the opinion that Soria met the requirements of competency to be executed. In the end, Soria refused to cooperate with either psychologist and no evaluation was made pursuant to the state court's order.

By July 22, 2000, Harris and Taylor received tearful calls from Soria's sister who maintained that he had deteriorated mentally and pleaded that another attempt be made to have Dr. Schmitt examine him. Harris agreed to travel to Livingston with Dr. Schmitt in a last attempt

to get Soria to talk to Schmitt. Harris hoped that since Soria had known him longer than any other attorney in the case he could persuade Soria to talk to Schmitt. Soria, when seen by Harris and Schmitt on July 25, was covered with numerous razor cuts that he had inflicted on himself. At Harris' urging, he answered Dr. Schmitt's questions. Based on this interview, Dr. Schmitt concluded that Soria did not have the requisite mental competency as defined under TEX. CODE CRIM. PROC. ANN., Art. 46.04 for the execution to proceed. Harris informed the state and Taylor of Schmitt's conclusions by telephone from the Houston Airport. Based on Soria's condition a motion pursuant to Art. 46.04, *Id.*, would be filed the following morning.

The motion to determine competency to be executed was filed on the morning of the execution date, July 26, 2000, and a motion for stay of execution was promptly lodged with the Court of Criminal Appeals, the 5th Circuit, and the United States Supreme Court. The trial court denied relief, as did the Court of Criminal Appeals and the 5th Circuit. Shortly after 5:00 p.m., the United States Supreme Court denied relief with two justices dissenting. Soria was executed at 6:26 p.m. on July 26, 2000.

Respondent Harris and Taylor both sought compensation from the District Court for attorney's fees for services rendered to Juan Soria in applying for Clemency and for litigating his competency to be executed. * * *

[Page 6]

Argument and Legal Authority

* * *

[Page 12]

Respondents can find no statutory authorization for payment of court appointed counsel in clemency proceedings in Texas. The Texas Code of Criminal Procedure creates a right to counsel only in judicial proceedings, TEX. CODE CRIM. PROC. ANN., Art. 1.051. Even this right does not extend to proceedings in state court relating to a condemned persons competency to be executed according to the Texas Court of Criminal Appeals in *Ex parte Caldwell*, 2000 WL 1228848 (Tex.Cr.App. 2000).

Respondents have already pointed out that this court has previously approved attorney's fees in these circumstances. Other Courts in Texas have also done so without prior approval and apparently without reference to presumptive maximum fee limitations. Attached to this response and incorporated for all purposes as exhibits G and H respectively, are the affidavits of Raoul Schonemann and Joe Marguiles. Mr. Schonemann was federally appointed in *Willis Jay Barnes v. Gary L. Johnson*, C.A. No. H-97-400 (S.D. Tex. 1998), a death penalty case in the Southern District of Texas. After representing Mr. Barnes in a habeas proceeding pursuant to 28 U.S.C. §2254, Mr. Schoenemann continued to represent Mr. Barnes in proceedings for executive clemency from the Governor of the State of Texas and the Board of Pardons and Paroles. He did not seek prior approval, but represented Mr. Barnes pursuant to the mandate of the 848(q). He was paid in full for his representation by the district court after being directed by the 5th Circuit to [Page 13] submit his voucher for clemency to the district court.

Similarly, Mr. Joe Marguiles was appointed by the federal District Court for the Eastern District of Texas pursuant to 848(q) in *Betty L. Beets v. Gary L. Johnson*, No. 6:90-CV-575 (E.D. Tex. 1997). He also continued to represent his client during state executive clemency proceedings pursuant to the language of the statute. While he did submit travel expenses for prior approval, he sought no prior approval for his fees. His fees were paid by the District Court in full. This is despite the fact that when added to his fees for the original habeas, they exceeded the presumptive maximum fee.

* * *

[Page 14]

In clemency and competency matters, counsel is working usually within days and even, as this case, hours of an execution. The factual basis of the claims are more current and must be developed in large part from events and circumstances that have arisen since the habeas process was concluded. Time is of the essence in this situation and, many times, the nature and extent of such representation cannot be anticipated. Such is especially so in circumstances such as the instant case where in the condemned prisoner's mental status deteriorated on an hourly or daily basis.

* * *

Respectfully submitted,

WILLIAM S. HARRIS
Attorney and Counselor at Law
307 West 7th Street, Suite 1905
Fort Worth, Texas 76102
(817) 332-5575; (817) 335-6060 FAX

[Page 15]

Email: wsharris@onramp.net

by: _____
William S. Harris
State Bar No. 09096700

GARY TAYLOR
Attorney and Counselor at Law
P. O. Box 90212
Austin, Texas 78709-0212
(512) 301-5100; (512) 301-5329 FAX
State Bar No. 19691650
Email: gtlaw@earthlink.net

RESPONDENTS

MOTION FILED
SEP 10 2002.

No. 01-1605

IN THE

Supreme Court of the United States

IN RE: GARY A. TAYLOR AND
WILLIAM S. HARRIS,

Petitioners.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF NATIONAL MENTAL HEALTH ASSOCIATION AND THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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29 pp

IN THE

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No. 01-1605

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

The National Mental Health Association and the Judge David L. Bazelon Center for Mental Health Law respectfully move for leave to file their attached brief as *amici curiae* in support of petitioners Gary A. Taylor and William S. Harris. On April 25, 2002, a petition for writ of certiorari was filed in *In re: Gary A. Taylor and William S. Harris*, No. 01-1605. The Attorney General of Texas, who represented the respondent in the underlying habeas corpus action, declined to file a brief in opposition to the petition, informing the Court by letter that the State has no interest in this case.

On June 17, 2002, this Court called for the views of the Solicitor General. In light of the Court's request for the views of the Solicitor General, *amici curiae* believe that it may be useful for this Court to consider the views of organizations specializing in the rights and interests of individuals

with mental disabilities and therefore request permission to file this brief. Although an *amicus curiae* brief is ordinarily due within the time for filing the respondent's brief in opposition, no brief in opposition has been filed or will be filed, and the Solicitor General has not yet filed his brief.

Amicus curiae the National Mental Health Association is a nonprofit organization dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research, and services. *Amicus curiae* the Judge David L. Bazelon Center for Mental Health Law is a national nonprofit organization that provides legal and policy advocacy to protect the civil rights and human dignity of individuals with mental illness and mental retardation.

Amici believe that this case warrants this Court's review because it raises a question of the greatest importance to the administration of the death penalty: whether the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(q)(8), authorizes compensation for counsel who represent condemned prisoners in conjunction with state post-conviction competency and clemency proceedings. Although the question presented is important for all death row inmates, *amici* believe that the issue is especially important because of its bearing on the fate of prisoners with mental disabilities, many of whom cannot be executed consistent with the Eighth Amendment of the Constitution and some of whom may well be actually innocent of the crimes of which they were convicted. For these reasons, *amici curiae* respectfully ask the Court to grant this motion and to permit the filing of the accompanying brief.

Respectfully submitted,

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September 10, 2002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTEREST OF AMICI CURIAE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. PRISONERS WHO HAVE MENTAL IMPAIRMENTS CANNOT NAVIGATE STATE COMPETENCY PROCEEDINGS WITHOUT THE ASSISTANCE OF COUNSEL. 8

II. THE STATUTORY RIGHT TO COUNSEL FOR STATE CLEMENCY PROCEEDINGS IS AN IMPORTANT SAFEGUARD AGAINST THE EXECUTION OF MENTALLY IMPAIRED INDIVIDUALS, SOME OF WHOM MAY BE ACTUALLY INNOCENT 13

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Atkins v. Virginia,
122 S. Ct. 2242 (2002) ..... *passim*

Clark v. Johnson (*In re Taylor*),
278 F.3d 459 (5th Cir. 2002) 6

Ford v. Wainwright,
477 U.S. 399 (1986) 4, 8, 12, 18

Herrera v. Collins,
506 U.S. 390 (1993) 14

Hill v. Lockhart,
992 F.2d 801 (8th Cir. 1993) 6

In re Lindsey,
875 F.2d 1502 (11th Cir. 1989) 5, 6

King v. Moore,
No. 02-13717-P (11th Cir. Jul. 24, 2002) 5

Lowery v. Anderson,
138 F. Supp. 2d 1123 (S.D. Ind. 2001) 6

McFarland v. Scott,
512 U.S. 849 (1994) 19

Singleton v. Endell,
870 S.W.2d 742 (Ark. 1994) 9

Strickler v. Greene,
57 F. Supp. 2d 313 (E.D. Va. 1999) 6

STATUTES

21 U.S.C. § 848 ..... *passim*

28 U.S.C. § 2254 5

TABLE OF AUTHORITIES
(continued)

Page(s)

28 U.S.C. § 2255 5

Ala. Code § 15-12-23 (2002) 11

Ala. Code § 15-16-23 (2002) 9

Ark. Code Ann. § 16-90-506 (2001) 9, 10

Fla. Stat. Ann. § 922.07 (West 2001) 9, 11

Ga. Code Ann. § 17-10-60 to -71 (2002) 9

Ga. Code Ann. § 17-10-60 (2002) 10, 11

Ga. Code Ann. § 17-10-63 (2002) 10

Ga. Code Ann. § 17-10-66 (2002) 11, 12

Miss. Code Ann. § 99-19-57 (West 2001) 9, 10

Mo. Rev. Stat. § 552.060 (2001) 9

Neb. Rev. Stat. § 29-2537 (2001) 9

Tex. Code Crim. Proc. Ann. art. 46.05 (Vernon 2002) 9, 11

RULES

Supreme Court Rule 37.6 1

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. VIII 3, 4, 8

OTHER AUTHORITIES

ABA Standards for Criminal Justice (2d ed. 1989) 9

Jonathan L. Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for*

TABLE OF AUTHORITIES
(continued)

Page(s)

the Future, 22 N.Y.U. REV. L. & SOC. CHANGE 59 .....7, 15

Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419 (Fall 1990) 14

Death Penalty and People with Mental Illness, available at http://www.nmha.org/position/deathpenalty.cfm .6, 15, 16

James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985).....10, 15

John L. Farringer, IV, Note, *The Competency Conundrum: Problems Courts Have Faced in Applying Different Standards for Competency to Be Executed*, 54 VAND. L. REV. 2441 (2001).....11

Dorothy O. Lewis, M.D., et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838 (1986).....10, 16

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TABLE OF AUTHORITIES
(continued)

Page(s)

Christopher Slobogin, *Mental Illness and the Death Penalty*, 1 CALIF. CRIM. L. REV. 3, *available at* http://boalt.org/CCLR/v1/v1slobogintext.htm 16, 17

www.deathpenaltyinfo.org/clemency.html 18

www.deathpenaltyinfo.org/DrowInfo.html.....6

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BRIEF OF NATIONAL MENTAL HEALTH ASSOCIATION AND THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

This brief is filed on behalf of the National Mental Health Association and the Judge David L. Bazelon Center for Mental Health Law as *amici curiae* in support of petitioners, with the written consent of the petitioners.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than the National Mental Health Association and the Bazelon Center, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. A letter of consent from petitioners is filed with this brief. The State of Texas filed a statement of non-interest in the case.

INTEREST OF AMICI CURIAE

The National Mental Health Association ("NMHA") is a nonprofit organization dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research, and services. With 340 affiliates in 43 states and the District of Columbia, NMHA has worked toward eliminating discrimination against and public misconceptions about people with mental illness since 1909. NMHA believes that mental illness can influence an individual's mental state at the time he or she commits a crime. NMHA also believes mental illness should be taken into account as a mitigating factor during all phases of a potential death penalty case, including post-conviction clemency and competency proceedings, and that condemned prisoners who have mental illness should not be executed. NMHA has urged clemency authorities in several states to commute death sentences to life in prison because of the existence of mental illness.

The Judge David L. Bazelon Center for Mental Health Law ("the Bazelon Center") was formed in 1972 and is the leading national legal advocate for people with mental illness and mental retardation. The Bazelon Center promotes the civil rights and human dignity of individuals with mental disabilities through litigation, policy advocacy, education, and training. The Center has brought major cases decided by this Court establishing the rights of people with mental disabilities, and it has participated as *amicus curiae* in numerous additional cases before this Court.

NMHA and the Bazelon Center believe that this case warrants this Court's review because there is an established intercircuit conflict with regard to the proper interpretation of 21 U.S.C. § 848(q), and because the legal question involved will have a substantial impact on the number of mentally impaired prisoners that are wrongly executed. *Amici* believe that mental disabilities should always be taken into

account during state post-conviction competency and clemency proceedings. Without a right to counsel, however, the vast majority of death row inmates with mental illness and mental retardation are incapable of navigating those proceedings. Because execution of mentally impaired individuals raises questions of the gravest importance under the Eighth Amendment, this Court's expeditious resolution of this controversy is warranted.

SUMMARY OF ARGUMENT

The decision of the Fifth Circuit presents an intercircuit conflict on a question of great importance to the administration of the death penalty: whether the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(q)(8), authorizes compensation for counsel who represent condemned prisoners in conjunction with state post-conviction competency and clemency proceedings. Although the question presented is important for all death row inmates, *amici* believe that the issue is especially important because of its bearing on the fate of prisoners with mental disabilities, many of whom cannot be executed consistent with the Eighth Amendment of the Constitution and some of whom may well be actually innocent of the crimes of which they were convicted. As this Court recently recognized in the context of mental retardation, individuals with mental disabilities are more likely than the average person to be wrongfully convicted and wrongfully sentenced to death. Yet those same individuals are also less likely than others to be able to navigate successfully the post-conviction competency and clemency proceedings that hold their last hope of avoiding an unconstitutional execution. Upholding Congress' clear intent to provide counsel for death row inmates for "such competency proceedings and proceedings for executive and other clemency as may be available to the defendant," *id.*, is one significant means by which the risk of unconstitutional executions can be minimized.

Sixteen years ago, in *Ford v. Wainwright*, 477 U.S. 399 (1986), this Court held that executing an insane person violates the prohibition against cruel and unusual punishment. The determination of the procedures to be used in deciding which individuals are mentally incompetent is, however, largely left to the states. As discussed in this brief, the post-conviction procedures that states have created to identify incompetent inmates are complicated and would be difficult to navigate pro se even for a prisoner in command of all his faculties. Unfortunately, without the aid of counsel, it is the prisoners with the greatest psychological or cognitive impairments – the ones most likely to meet the standards of mental incompetence articulated by the states – who are least likely to succeed in invoking the protections of the Eighth Amendment. Those individuals are also unlikely to be able to persuade clemency authorities to consider their mental impairment as a mitigating factor justifying commutation of a death sentence to a term of life imprisonment.

This Court should address the proper interpretation of section 848(q)(8) now. As the petitions for certiorari correctly explain, there is a clear conflict among the courts of appeals. Indeed, the circuits that include the most active death penalty jurisdictions have already weighed in on the question, with the Fifth and Eleventh Circuits clearly holding that counsel should not be compensated for representation in conjunction with state competency and clemency proceedings, and the Eighth Circuit clearly holding that counsel should be compensated. Thus, the lower courts are in need of this Court's guidance with regard to the proper interpretation of section 848(q)(8).

Even more importantly, postponing resolution of the question at hand would increase the risk that mentally impaired individuals in the jurisdictions denying compensation will be executed in the meantime because their impairments are not properly accounted for in state competency and

clemency proceedings. In light of the inherent unreliability of the convictions of people with mental disabilities, there is also a substantial possibility that an innocent person will be executed as a result. Accordingly, *amici* urge this Court to grant certiorari and resolve this question now.

ARGUMENT

Section 848(q) of Title 21 by its terms grants to all indigent state and federal condemned inmates a right to counsel and to expert and investigative services for post-conviction proceedings. *See* 21 U.S.C. § 848(q)(4)(B). The right to counsel and other services encompasses not only representation for habeas corpus proceedings under sections 2254 or 2255 of Title 28, *see id.*, but also for "such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." *Id.* § 848(q)(8) (emphasis added). As explained in detail in the two petitions for certiorari,[2] that right to counsel covers both federal and state post-conviction clemency and competency proceedings, not just federal proceedings. *See* Pet. 9-22.

Despite Congress' clear intent, however, the Fifth Circuit in the decisions below held that section 848(q)(8) does not authorize compensation for attorneys in *state* clemency and competency proceedings. *See* Pet. 8a, 10a. The decisions below deepened an existing conflict of authority between the Eleventh Circuit, which like the Fifth Circuit holds that compensation for such proceedings is not available, *see In re Lindsey*, 875 F.2d 1502, 1506 (11th Cir. 1989); *King v. Moore*, No. 02-13717-P (11th Cir. Jul. 24, 2002) (denying appointment of counsel for state post-conviction proceedings

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[2] This brief addresses the statutory right to counsel for indigent prisoners in state competency and clemency proceedings as raised in the petition for a writ of certiorari in *In re: Taylor and Harris*. However, the arguments in this brief also apply to issues raised in the closely related petition filed in *In re: Wischkaemper and Taylor*, No. 01-1623.

based on holdings of *Lindsey* and *Clark v. Johnson* (*In re Taylor*), 278 F.3d 459 (5th Cir. 2002)), and the Eighth Circuit, which clearly holds that counsel should be compensated. *See Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993).[3]

The question that is the subject of this conflict of authority – whether indigent condemned prisoners will have access to counsel in conjunction with state competency and clemency proceedings – is of critical importance to the many prisoners with mental disabilities on death row. There are approximately 3,718 state and federal inmates awaiting capital punishment nationwide, *see* www.deathpenaltyinfo.org/DrowInfo.html, and a significant percentage of them are impaired to some degree by mental illness, mental retardation, or both. "[I]t is estimated that 5-10 percent of people on death row have a serious mental illness." *Death Penalty and People with Mental Illness*, *available at* http://www.nmha.org/position/deathpenalty.cfm [hereinafter *People with Mental Illness*]. In addition, a large number of death

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[3] This intercircuit conflict is established and real. Courts in the Eighth Circuit routinely find that the procedural requirements of *Hill* are satisfied and grant compensation requests for such attorney services, whereas courts in the Fifth and Eleventh Circuits routinely deny such claims. Moreover, in practical terms, the conflict of authority encompasses more than three circuits. District courts in the Fourth and Seventh Circuits have held that fees for clemency and/or competency proceedings are recoverable, *see Strickler v. Greene*, 57 F. Supp. 2d 313, 316 (E.D. Va. 1999); *Lowery v. Anderson*, 138 F. Supp. 2d 1123, 1125 (S.D. Ind. 2001) (granting fees based on the plain language of section 848(q)(8) and the "straightforward and persuasive reasoning" of *Hill v. Lockhart*), and the State's statement of non-interest in this case suggests that it is unlikely that grants of fees in those jurisdictions will be appealed. In addition, the First, D.C., and Federal Circuits have no death penalty docket to speak of, so those circuits cannot be expected to weigh in on this controversy.

Counsel for petitioners has informed *amici* that petitioners plan to file a supplemental brief that will provide additional information to the Court about the extent of the intercircuit conflict.

row inmates are mentally retarded. *See Offending Justice*, available at http://www.ncadp.org/html/fact6.html (approximately "10% of the death row population may be afflicted with mental retardation"). Some prisoners have a mental illness and are mentally retarded. *See, e.g.*, Frank Menolascino, CHALLENGES IN MENTAL RETARDATION: PROGRESSIVE IDEOLOGY AND SERVICES 126-27 (1977) (estimating that approximately 30 percent of mentally retarded individuals also suffer from mental illness); Jonathan L. Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since* Penry *and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 71-72 (1996) ("[T]he incidence of mental illness among retarded people is estimated to be quite high, between twenty and sixty-four percent.").

For those mentally impaired inmates, the statutory right to counsel at post-conviction state competency and clemency proceedings is a much needed safeguard on our nation's imperfect system of capital punishment for at least two reasons. *First*, the right to counsel for state competency proceedings is likely to prevent some executions of individuals with mental disabilities who satisfy the standard for incompetency-to-be-executed and whose executions would therefore be unconstitutional under the Eighth Amendment. As explained below, given the complexity of state competency proceedings and the high evidentiary thresholds that must be met, it is those inmates most likely to satisfy the criteria that are also least likely to be able to make such a showing without the assistance of counsel. *Second*, the right to counsel for state clemency proceedings provides an important safeguard that may spare from execution some impaired individuals who are actually innocent of the crimes of which they were convicted, or who should not have been sentenced to death. As this Court has acknowledged, a "disturbing number" of death row inmates have been exonerated in recent years. *Atkins v. Virginia*, 122 S. Ct. 2242, 2252 n.25 (2002). This

Court has also recognized that, for a number of reasons, the convictions and death sentences of mentally impaired defendants are less reliable than the convictions and death sentences of defendants without mental disabilities. With the assistance of counsel at clemency proceedings, some wrongly convicted or sentenced individuals may be spared execution.

For these and other reasons, this Court should grant certiorari and resolve the question presented here.

I. PRISONERS WHO HAVE MENTAL IMPAIRMENTS CANNOT NAVIGATE STATE COMPETENCY PROCEEDINGS WITHOUT THE ASSISTANCE OF COUNSEL.

In *Ford*, this Court held that executing an insane person violates the Eighth Amendment. "It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." 477 U.S. at 417.[4] The Court, however, left it to the States to determine how to implement these constitutional prohibitions. *See id.* at 416-17 ("[W]e leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."). As the Court recognized, "[i]t may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity." *Id.* at 417. Applying this guidance, the states have

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[4] Just this past term, in *Atkins v. Virginia*, 122 S. Ct. 2242 (2002), this Court extended that principle to bar capital punishment of mentally retarded individuals. The Court explained that it was "not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty," and "therefore conclude[d] that such punishment is excessive." *Id.* at 2252. We explain below why many of the concerns articulated by the Court in *Atkins* apply equally to the context of mental illness.

implemented post-conviction competency procedures that would be very difficult for any inmate without formal legal training – much less a mentally impaired individual – to handle successfully without a lawyer's assistance.

In many states (and in nearly all of the states in the Fifth and Eleventh Circuits), for example, the inmate must make a motion to the proper court in order to initiate a competency proceeding.[5] *See, e.g.*, Fla. Stat. Ann. § 922.07 (West 2001); Ga. Code Ann. § 17-10-60 to -71 (2002); Tex. Code Crim. Proc. Ann. art. 46.05 (Vernon 2001); Ala. Code § 15-16-23 (2002); Miss. Code Ann. § 99-19-57 (West 2001). In order to bring such a motion pro se, the inmate must first recognize that he is mentally impaired. Unfortunately, many inmates with mental illness and mental retardation[6] are not aware of

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[5] In other states, competency proceedings are triggered by the State itself. *See, e.g.*, Neb. Rev. Stat. § 29-2537 (2001) (providing that the custodian of a prisoner sentenced to death who appears to be mentally incompetent shall give notice to a judge of the district in which the prisoner was tried and sentenced); Mo. Rev. Stat. § 552.060(2) (2001) (director of the department of corrections shall initiate a proceeding if he "has reasonable cause to believe that any inmate then in confinement in a correctional facility and sentenced to death has a mental disease or defect excluding fitness for execution"); Ark. Code Ann. § 16-90-506(d)(1) (2001). Even with an attorney's assistance, it may be difficult or impossible for a prisoner in those jurisdictions to obtain a competency evaluation. *See, e.g., Singleton v. Endell*, 870 S.W.2d 742 (Ark. 1994).

[6] The outcome of this case is likely to affect the fates of death row inmates with mental retardation as well as those with mental illness. The ABA Criminal Justice Mental Health Standards apply the same standard to mental illness and mental retardation for purposes of determining competency to be executed, and therefore many states will probably consider the issue of mental retardation at competency proceedings. *See* ABA Criminal Justice Mental Health Standards 7-5.6, 290 (2d ed. 1989) ("A convict is incompetent to be executed if, as a result of mental illness or mental retardation the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or mental retardation, the convict lacks

their impairments, will not acknowledge those impairments, or fail to recognize the relevance of those impairments to their conviction or sentence. *See, e.g.*, Dorothy O. Lewis, M.D., et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 844 (1986) (describing instances where death row inmates were unaware of the existence or relevance of their mental impairments); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985) (explaining that individuals with mental retardation often attempt to cover up their disability, and that attorneys often fail to detect it); *see also infra*. Thus, without the assistance of an attorney, mentally impaired inmates are unlikely ever to realize that they should bring a motion.

Even if a prisoner with a mental disability recognizes the need to bring a motion, it will be difficult for him to obtain a hearing without the assistance of counsel. *See, e.g.*, Ga. Code Ann. § 17-10-63 (2002) (applicant "shall set forth alleged facts in support of the assertion that the applicant is presently mentally incompetent to be executed"). If he is lucky enough to get a hearing, he still must prove that he satisfies the criteria for insanity. In most states, the burden is on the prisoner to prove that, because of a mental condition, he "is presently unable to know why he or she is being punished and understand the nature of the punishment." *Id.* § 17-10-60.[7] It is difficult to see how a person who meets

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sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court."). The right to counsel in such proceedings is obviously just as important to mentally retarded prisoners as to those who have mental illness.

[7] *See also, e.g.*, Miss. Code Ann. § 99-19-57 ("[A] person shall be deemed insane if the court finds the convict does not have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which

that standard could possibly submit the required papers and proof to establish that he is entitled to relief without the assistance of an attorney and other necessary services, such as an expert trained in matters of mental illness. *Cf.* John L. Farringer, IV, Note, *The Competency Conundrum: Problems Courts Have Faced in Applying Different Standards for Competency to Be Executed*, 54 VAND. L. REV. 2441, 2488 (2001) (explaining the difficulty that even judges have in evaluating evidence with regard to a prisoner's competency).

The difficulties faced by indigent prisoners raising claims of mental incompetence are not ameliorated by state law. Of the states encompassed by the intercircuit conflict here, only Florida provides a statutory right to counsel in conjunction with those proceedings. *See* Fla. Stat. Ann. § 922.07(1).[8] And only a few states appear to provide compensation for the appointment of an expert witness. *See* Ark. Code Ann. § 16-90-506 (providing a "reasonable allowance" for an independent mental health evaluation); Ga. Code Ann. § 17-10-66 (2002) (under certain circumstances, "the court shall appoint an expert to make an examination of the applicant . . . [and p]ayment for such expert shall be made by the Department of Corrections").[9]

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awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorneys or the court."); Ga. Code Ann. § 17-10-60 ("The term 'mentally incompetent to be executed' means that because of a mental condition the person is presently unable to know why he or she is being punished and understand the nature of the punishment."); Tex. Code Crim. Proc. Ann. art. 46.05(h) ("A defendant is incompetent to be executed if the defendant does not understand: (1) that he or she is to be executed and that the execution is imminent; and (2) the reason he or she is being executed.").

[8] One state, Alabama, also provides for judicial discretion to appoint counsel in competency proceedings. *See* Ala. Code § 15-12-23 (2002).

[9] To *amici's* knowledge, no other state in the Fifth, Eighth, or Eleventh Circuits has a statute that provides for the appointment of counsel or

Deprivation of the federally provided right to counsel at issue here effectively leads to the very situation found unconstitutional by this Court in *Ford*. In that case, this Court recognized that a competency hearing at which only state-appointed psychiatrists testified – and the inmate and his counsel were not permitted to testify – violated the Eighth Amendment. *See* 477 U.S. at 403-04. In so ruling, the Court expressly found that "without any adversarial assistance from the prisoner's representative . . . [,] the factfinder loses the substantial benefit of potentially probative information. The result is a much greater likelihood of an erroneous decision." *Id.* at 414. Similarly here, if inmates are unable to avail themselves of the services of court-appointed counsel and experts under section 848(q), the risk of an erroneous decision with regard to competence is unacceptably high.

Indeed, tragically, it is those inmates most likely to satisfy the criteria that are least likely to be able to make such a showing without the assistance of counsel. This outcome flies in the face of the Court's prohibition on the execution of the mentally incompetent. It invites arbitrary imposition of the death penalty upon individuals incapable of communicating their own illness, leaving them at the mercy of the state in much the same way that the Florida procedure invalidated in *Ford* did. Enforcing the statutory right to counsel provided for by Congress in section 848(q) is the best way to

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independent experts for competency-to-be-executed hearings. Even in those states that do provide for the appointment of an expert witness, it is not clear how an indigent prisoner would find such an expert without the assistance of counsel. Moreover, the right to an expert witness may be inadvertently waived if the inmate fails to make his request at the proper time. *See, e.g.*, Ga. Code Ann. § 17-10-66(b) ("The applicant shall further submit [simultaneously] with the motion a specific statement as to the particular expert requested, the nature of the examination to be conducted, the time period within which an examination can be conducted and an estimate of the expenses to be incurred.").

avert some of those unconstitutional executions without imposing an undue burden on the state.

II. THE STATUTORY RIGHT TO COUNSEL FOR STATE CLEMENCY PROCEEDINGS IS AN IMPORTANT SAFEGUARD AGAINST THE EXECUTION OF MENTALLY IMPAIRED INDIVIDUALS, SOME OF WHOM MAY BE ACTUALLY INNOCENT.

At stake in this litigation is not only the fate of individuals who, although fully competent at the time of their offense and trial, have become incompetent prior to execution. Also hanging in the balance is the fate of numerous death row inmates who were mentally impaired even at the time of their offense, conviction, and sentence, but whose impairment for any number of reasons was not detected, revealed, or given credence at that time. For those inmates, whose convictions and sentences are inherently less reliable than those of non-impaired defendants, enforcing the statutory right to counsel at clemency proceedings provides a critical safeguard against wrongful execution. With the assistance of counsel, some mentally impaired individuals on whom the death penalty was unjustifiably imposed or who were wrongly convicted despite their innocence may have their death sentences commuted despite failing to satisfy the exceedingly high state-established standards for incompetency-to-be-executed.

Last Term, in *Atkins v. Virginia*, this Court expressed concern about the unreliable convictions and unjustified death sentences that have been imposed in recent years, particularly on defendants who are mentally impaired:

> Despite the heavy burden that the prosecution must shoulder in capital cases, we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated. As two recent high-profile cases demonstrate, these exonerations include mentally retarded persons who unwittingly confessed to crimes that they did not commit.

122 S. Ct. at 2252 n.25; *see also Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor & Kennedy, JJ., concurring) ("[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event.").

The Court was also troubled by the fact that, for a variety of reasons, "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution":

> The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," *Lockett v. Ohio*, [438 U.S. 586, 605 (1978)], is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Atkins, 122 S. Ct. at 2251-52; *see generally* Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419 (Fall 1990).

Although *Atkins* dealt specifically with the issue of mentally retarded defendants, the Court's reasoning also applies to mentally ill individuals, many of whom face very similar

problems in our criminal justice system.[10] Just like mental retardation, "mental illness can influence an individual's mental state at the time he or she commits a crime, can affect how 'voluntary' and reliable an individual's statements might be, can compromise a person's competence to stand trial and to waive his or her rights, and may have an effect upon a person's knowledge of the criminal justice system." *People with Mental Illness*, *supra*. Like mentally retarded offenders, mentally ill offenders are also less culpable for their actions:

> [P]eople proven to be psychotic at the time of the offense are as volitionally and cognitively impaired at that crucial moment as children and people with mental retardation who commit crimes. If anything, the delusions, command hallucinations, and disoriented thought processes of those who are mentally ill represent greater dysfunction than that experienced by most 'mildly' retarded individuals (defined as having an IQ of between 55 and 70) and by virtually any non-mentally ill teenager. Even certain types of personality disorders, among them paranoid personality and borderline personality, may be associated with gross impairment that equals or exceeds the level of impairment normally present in these other subgroups.

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[10] There are, of course, important differences between mental illness and mental retardation. *See* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 424 (1985) ("[T]he cardinal difference [between mental retardation and mental illness] is that . . . [m]entally ill people encounter disturbances in their thought processes and emotions; mentally retarded people have limited abilities to learn."); *see generally* Bing, *supra*, at 71-72 (discussing differences between mental retardation and mental illness). But, as this brief demonstrates, both groups face similar obstacles in our criminal justice system.

Christopher Slobogin, *Mental Illness and the Death Penalty*, 1 CALIF. CRIM. L. REV. 3, ¶ 12, *available at* http://boalt.org/CCLR/v1/v1slobogintext.htm.

Although our criminal justice system should in theory take account of the lower culpability of mentally ill defendants at the trial and sentencing phase, the empirical evidence demonstrates that the opposite is often true. Similar to the mental retardation context, "our current system of fact-finding in capital cases fails to identify who among those convicted and sentenced to death actually has a mental illness." *People with Mental Illness*, *supra*. As a result, "there is reason to believe that individuals with mental illness are being executed without the criminal justice system knowing of the existence of that illness and, therefore, without the requisite consideration of whether that mental illness may be a mitigating factor in these cases." *Id.* For example, in one study of fifteen death row inmates believed to be representative of the general death row population, "six subjects were found to be chronically psychotic," three were "episodically psychotic," and two suffered from bipolar mood disorder. Lewis et al., *supra*, at 840. Yet those "serious disorders were not previously identified and presented in the original trials, during sentencing, or in the course of subsequent appeals." *Id.* at 844. The researchers concluded:

> Probably a major reason for the failure to identify these vulnerabilities previously was that nobody suspected their existence and hence nobody looked for them. Moreover, contrary to the popular notion that murderers are simply sociopaths who will feign illness to 'get off,' most of the subjects did not consider themselves sick or impaired and did not request specialized evaluation.

Id. (describing instances where death row inmates were unaware of the existence or relevance of their mental impairments).[11]

Also as with mental retardation, despite the fact that "[e]very state death penalty statute, either explicitly or implicitly, stipulates that mental illness at the time of the offense be considered as a possible mitigating circumstance," "research on the behavior of capital sentencing bodies strongly suggests that judges and juries often treat evidence of mental illness in precisely the opposite manner." Slobogin, *supra*, ¶¶ 17, 19; *see id.* ¶¶ 20-23 (summarizing research showing that death sentence is more likely to be imposed if defendant presents evidence of mental illness or relies unsuccessfully on an insanity defense). A study using mock jurors found that those jurors who are willing to impose the death penalty are more likely to believe that "mental state arguments by people with mental illness are 'a ruse and an impediment to the conviction of criminals.'" *Id.* ¶ 21. Other research suggests that jurors may fear defendants who have mental illness and may therefore impose a harsher sentence, perhaps using the defendant's perceived "future dangerousness" as an aggravating factor. *See id.* ¶¶ 22, 23. In fact, one study of 128 cases in Georgia found that "a failed insanity defense was one of the most accurate predictors of who would receive the death penalty, ahead of such variables as prior record and commission of another crime at the time of the homicide, and behind only the number of official aggravating factors proven at sentencing." *Id.* ¶ 19. In *Atkins*, this

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[11] Thus, although mental illness differs from mental retardation because it is possible for a prisoner to develop a mental illness after he is sentenced (whereas a mentally retarded person presumably is always mentally retarded), many instances where mental illness is first raised in pre-execution proceedings may have involved a mental illness that was actually present but undiscovered by the court at the time of the inmate's offense and trial.

Court acknowledged that "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 122 S. Ct. at 2252 (citing *Penry v. Lynaugh*, 492 U.S. 302, 323-25 (1989)). The same observation applies to reliance on mental illness as a mitigating factor.[12]

Thus, as in the mental retardation context, the convictions and death sentences of mentally ill offenders are inherently much less reliable than those of non-impaired offenders. For those mentally impaired inmates whose impairments were not adequately taken into account during the conviction and sentencing phase – but who cannot satisfy the legal definition of incompetency-to-be-executed – the right to counsel at clemency proceedings is a critical final safeguard against wrongful execution. *See, e.g.*, http://www.deathpenaltyinfo.org/clemency.html (listing reasons for commutation of death sentences, including those of Bobbie Shaw in 1993, Calvin Swann in 1999, and Alexander Williams in 2002, all based at least in part on mental disabilities). Yet, for reasons similar to those that arise in the context of competency proceedings, *see supra*, prisoners with mental disabilities who lack access to counsel and expert witnesses are unlikely to be able to persuade a clemency authority that their lives should be spared due to mental illness.

There can be no doubt that the question raised by the petition in this case is critically important. *See Ford*, 477 U.S. at 411 (plurality opinion of Marshall, J.) (recognizing that "execution is the most irremediable and unfathomable of

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[12] Because of this tendency to penalize individuals with mental illness, even where an attorney discerns a mental illness or disability in her client, she may not raise it during trial and sentencing. In such cases, it is even more important that a condemned prisoner has counsel to raise the issue in post-conviction competency and clemency proceedings.

penalties," and that therefore "death is different") (citations omitted). There also can be no doubt that the Fifth Circuit got it wrong. Pet. 9-22. The plain text of section 848(q)(8) provides that an attorney appointed to represent an inmate in federal habeas proceedings "*shall* also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." 21 U.S.C. § 848(q)(8) (emphasis added). Petitioners correctly state that "Congress made clear that people sentenced to death should not be abandoned by their lawyers as an execution date nears." Pet. 9. As this Court recognized in *McFarland v. Scott*, 512 U.S. 849 (1994), Congress enacted section 848(q) based on a determination that "quality legal representation is necessary in capital habeas corpus proceedings in light of '*the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.*'" 512 U.S. at 855-56 (quoting 21 U.S.C. § 848(q)(7)) (emphasis added). In light of the plain text of the statute and the importance of ensuring that representation is provided for death row inmates in state competency and clemency proceedings, this Court should grant certiorari and reverse the decision of the Fifth Circuit.

CONCLUSION

For the foregoing reasons and those set forth persuasively by petitioners, the petition for a writ of certiorari should be granted.

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September 10, 2002

No. 01-1605

In the Supreme Court of the United States

IN RE GARY A. TAYLOR, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether 21 U.S.C. 848(q) provides prisoners who were sentenced to death by state courts the right to federally appointed and funded counsel in state clemency proceedings.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	7
A. Section 848(q) does not authorize federally appointed and funded counsel to represent state prisoners in state clemency proceedings	8
B. The court of appeals' decision does not directly conflict with the Eighth Circuit's decision in *Hill* v. *Lockhart*	15
C. The court of appeals' decision is fully consistent with *McFarland* v. *Scott*	17
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Apex Hosiery Co. v. *Leader*, 310 U.S. 469 (1940)	13
BFP v. *Resolution Trust Corp.*, 511 U.S. 531 (1994)	12
Bailey v. *United States*, 516 U.S. 137 (1995)	10
Brown v. *Gardner*, 513 U.S. 115 (1994)	10
Cantu-Tzin v. *Johnson*, 162 F.3d 295 (5th Cir. 1998), cert. denied, 525 U.S. 1091 (1999)	4
Chambers v. *Johnson*, 133 F. Supp. 2d 931 (E.D. Tex. 2001)	2, 4
Clark v. *Johnson*, 202 F.3d 760 (5th Cir.), cert. denied, 531 U.S. 831 (2000)	1, 2
Clark v. *State*, 881 S.W.2d 682 (Tex. Crim. App. 1994), cert. denied, 513 U.S. 1156 (1995)	1
FTC v. *Bunte Bros., Inc.*, 312 U.S. 349 (1941)	13
Gordon v. *Vasquez*, 859 F. Supp. 413 (E.D. Cal. 1994)	10, 14
Gregory v. *Ashcroft*, 501 U.S. 452 (1991)	13
Hill v. *Lockhart*, 992 F.2d 801 (8th Cir. 1993)	10, 15, 16

Cases—Continued: Page

Hollaway v. *United States*, 526 U.S. 1 (1999) 10
Jones v. *United States*, 526 U.S. 227 (1999) 12
King v. *Moore*, No. 02-13717-P (11th Cir. July 24, 2002) 11-12
King v. *St. Vincent's Hosp.*, 502 U.S. 215 (1991) 10
Lindsey, In re, 875 F.2d 1502 (11th Cir. 1989) . 3, 11, 13, 17
Lingar v. *Bowersox*, No. 89-1954-C-7 (E.D. Mo. May 11, 2000) 15
Lowery v. *Anderson*, 138 F. Supp. 2d 1123 (S.D. Ind. 2001) 10
McFarland v. *Scott*, 512 U.S. 849 (1994) 17
National Collegiate Athletic Ass'n v. *Smith*, 525 U.S. 459 (1999) 7
Pollard v. *E.I du Pont de Nemours & Co.*, 532 U.S. 843 (2002) 10
Raygor v. *Regents of the Univ. of Minn.*, 122 S. Ct. 999 (2002) 13
Rodden v. *Delo*, No. 91-0384-CV-W-9 (W.D. Mo. Feb. 11, 1999) 15
Ruckelshaus v. *Sierra Club*, 463 U.S. 680 (1983) 12
Soria, In re, 530 U.S. 1287 (2000) 6
Soria v. *Johnson*, 207 F.3d 232 (5th Cir.), cert. denied, 530 U.S. 1286 (2000) 5
Soria v. *State*:
933 S.W.2d 46 (Tex. Crim. App. 1996), cert. denied, 520 U.S. 1253 (1997) 4-5
No. 69,679 (Tex. Crim. App. June 8, 1994) 4
Sterling v. *Scott*, 57 F.3d 451 (5th Cir. 1995), cert. denied, 516 U.S. 1050 (1996) 3, 11, 12, 13, 17
Strickler v. *Greene*, 57 F. Supp. 2d 313 (E.D. Va. 1999) 10
Textron Lycoming Reciprocating Engine Div. v. *United Automobile Workers*, 523 U.S. 653 (1998) 10
United States v. *Bass*, 404 U.S. 336 (1971) 12-13

Statutes and rules: Page

21 U.S.C. 848(q) ..... *passim*
21 U.S.C. 848(q)(1) 11
21 U.S.C. 848(q)(1)-(3) 8, 11
21 U.S.C. 848(q)(4) 3, 8, 9
21 U.S.C. 848(q)(4)-(10) 8
21 U.S.C. 848(q)(4)(A) 11
21 U.S.C. 848(q)(4)(B) 3, 7, 11, 17
21 U.S.C. 848(q)(5) 9, 11
21 U.S.C. 848(q)(6) 9, 11
21 U.S.C. 848(q)(7) 9
21 U.S.C. 848(q)(8) 3, 8, 9, 10, 11, 12, 14, 17
21 U.S.C. 848(q)(9) 9
21 U.S.C. 848(q)(10) (1988) 15
21 U.S.C. 848(q)(10) 9, 15, 16
28 U.S.C. 2254 ..... 1, 2, 5, 11
28 U.S.C. 2255 11
Colo. Rev. Stat. § 16-8-303(1)(b) (2001) 18
Fla. Stat. Ann. (West 2001 & Supp. 2002):
§ 27.702 18
§ 922.07 18
§ 925.035(4) 18
Ky. Rev. Stat. Ann. § 31.010 (Michie 1998) 18
N.C. Gen. Stat. § 7A-451(c) (1999 & Supp. 2000) 18
N.Y. Correct. Law § 656(3) (McKinney 1987 & Supp. 2000) 18
Ohio Rev. Code Ann. § 2949.28(B)(3) (Anderson 1999) 18
Tenn. Code Ann. § 40-30-306 (1997) 18
Utah Code Ann. § 78-35a-202 (1996 & Supp. 2002)..... 18
Va. Code Ann. § 19.2-163.7 (Michie 2000 & Supp. 2001) 18-19
Wash. Rev. Code Ann. § 10.73.150(3) (West 2002) 18-19
Wyo. Stat. Ann. § 7-13-902(h) (Michie 1977 & Supp. 1995) 18

Rules—Continued: Page

Cal. Sup. Ct. Policies Regarding Cases Arising from Judgments of Death, Policy 3 (Jan. 16, 2002) 18
N.C. Indigent Defense Service Rule 2C.2 18
N.M. R. Crim. P. 5-802(F)(1) NMRA (2002) 18
Pa. R. Crim. P. 904(C) 18

In the Supreme Court of the United States

No. 01-1605

IN RE GARY A. TAYLOR, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. a. Following a jury trial in a Texas state court, Jack Wade Clark was convicted of murder and sentenced to death. See Pet. App. 1a. The Texas Court of Criminal Appeals affirmed his conviction and sentence, and this Court denied review. See *Clark* v. *State*, 881 S.W.2d 682 (1994) (en banc), cert. denied, 513 U.S. 1156 (1995). Clark sought and was denied habeas corpus relief in the Texas courts. See *Clark* v. *Johnson*, 202 F.3d 760, 763 (5th Cir.), cert. denied, 531 U.S. 831 (2000).

Clark then filed a petition for a writ of habeas corpus under 28 U.S.C. 2254 in the United States District Court for the Northern District of Texas. The court appointed petitioner Taylor to represent Clark in the

habeas corpus proceeding pursuant to 21 U.S.C. 848(q)(4)(B), which authorizes federal courts to appoint counsel to represent indigent prisoners who pursue Section 2254 relief. The district court denied the petition, and both the district court and the court of appeals declined to issue a certificate of appealability. See Pet. App. 1a-2a. This Court again denied review. 531 U.S. 831 (2000).

Clark submitted a clemency application to the Texas Board of Pardons and Paroles and sought a reprieve of execution from the Governor of Texas. On January 9, 2001, the Board of Pardons and Paroles denied clemency, the Governor of Texas declined to grant a reprieve, and Clark was executed. See Pet. App. 21a-22a.

b. Taylor then submitted to the district court a voucher requesting compensation and reimbursement for expenses incurred in connection with Clark's state clemency application and his request for a reprieve from the Texas Governor. See Pet. App. 2a, 21a-22a. The district court denied the request. Relying on *Chambers* v. *Johnson*, 133 F. Supp. 2d 931 (E.D. Tex. 2001), the court held that 21 U.S.C. 848(q) does not authorize compensation of federally appointed counsel for representation of state prisoners in state clemency proceedings. See Pet. App. 2a.

c. Taylor appealed. The court of appeals directed the parties to brief the question whether the court had appellate jurisdiction to review the district court's denial of payment to Taylor for his "activities" in "state clemency matters." Pet. App. 2a. In response, the Office of the Attorney General of Texas informed the court that Texas had no "interest or role" in the appeal. *Ibid.* Taylor's brief discussed both the jurisdictional question on which the court of appeals had requested briefing and the question whether "21 U.S.C. 848(q)

require[s] a federal court to pay appointed capital habeas corpus counsel for state clemency representation." See Pet. C.A. Br. iii, 8-17, 18-39.

The court of appeals affirmed the district court's order denying compensation. See Pet. App. 1a-8a. The court first concluded that it had jurisdiction to review the order. *Id.* at 2a-5a. Next, the court noted that 21 U.S.C. 848(q)(8) provides that counsel appointed to represent prisoners under Section 848(q)(4) "shall represent the defendant through every subsequent stage of available judicial proceedings * * * and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available." Pet. App. 5a (quoting 21 U.S.C. 848(q)(8)). The court explained that whether the phrase "proceedings for executive or other clemency" includes state clemency proceedings was a question of first impression in the Fifth Circuit. *Id.* at 6a.

The court observed, however, that the Eleventh Circuit had held that the phrases "subsequent stage[s] of available judicial proceedings" and "competency proceedings and proceedings for executive or other clemency" do "not encompass within their meanings any proceedings convened under the authority of a State." Pet. App. 6a (quoting *In re Lindsey*, 875 F.2d 1502, 1506 (11th Cir. 1989)). The court further observed that *Lindsey* had been cited favorably in *Sterling* v. *Scott*, 57 F.3d 451, 458 (5th Cir. 1995), cert. denied, 516 U.S. 1050 (1996), which held that an indigent state death row petitioner is not entitled to counsel under Section 848(q) for the purpose of exhausting his post-conviction state remedies. Pet. App. 6a. The court explained that *Sterling*, 57 F.3d at 457, had read Section 848(q)(8) in light of Section 848(q)(4)(B), which provides a right to appointed counsel only in federal proceedings. Pet.

App. 6a-7a. The court noted that the courts in *Lindsey* and *Sterling* had agreed that to permit death row petitioners to obtain federally appointed counsel to represent them in state post-conviction proceedings would effectively supplant state-court systems for the appointment of counsel in collateral review proceedings. *Id.* at 7a. The court further noted that, in *Chambers*, 133 F. Supp. 2d at 935-936, the district court had applied the principles announced in *Lindsey* and *Sterling* to deny reimbursement for representation of a death row petitioner in state clemency proceedings, and that the district court in this case had relied on *Chambers* in denying petitioner's claim for payment. Pet. App. 7a.

The court of appeals agreed with petitioner that *Sterling* does not resolve the precise question presented in this case, but the court nevertheless found *Sterling*'s discussion of Section 848(q) and its reasons for declining to read the section broadly "instructive." Pet. App. 7a. Citing *Cantu-Tzin* v. *Johnson*, 162 F.3d 295, 298-299 (5th Cir. 1998), cert. denied, 525 U.S. 1091 (1999), the court reasoned that the Fifth Circuit has continued to construe Section 848(q) narrowly, Pet. App. 7a, and concluded that "the phrase 'proceedings for executive or other clemency as may be available to the defendants' as it appears in § 848(q)(8) does not apply to state clemency proceedings" (*id.* at 8a). The court of appeals therefore affirmed the district court's order. *Ibid.*

2. a. A Texas state jury found Juan Soria guilty of murder, and he was sentenced to death. The Texas Court of Criminal Appeals initially reformed Soria's sentence to life imprisonment. See *Soria* v. *State*, No. 69,679 (June 8, 1994) (per curiam). On rehearing, however, the court reinstated the death sentence, and this Court denied review. See *Soria* v. *State*, 933 S.W.2d 46

(Tex. Crim. App. 1996), cert. denied, 520 U.S. 1253 (1997). Soria then sought and was denied habeas corpus relief in the Texas courts. See *Soria* v. *Johnson*, 207 F.3d 232, 236 (5th Cir.), cert. denied, 530 U.S. 1286 (2000).

On December 17, 1998, pursuant to 21 U.S.C. 848(q), the United States District Court for the Northern District of Texas appointed petitioners Taylor and Harris to represent Soria in habeas corpus proceedings under 28 U.S.C. 2254. On January 15, 1999, Soria filed a petition for a writ of habeas corpus. The district court denied the petition, and the district court and the court of appeals denied a certificate of appealability. See 207 F.3d at 236-251.

On June 14, 2000, Soria filed a petition for a writ of certiorari and moved for a stay of execution. While the petition was pending, Soria submitted an application for clemency to the Texas Board of Pardons and Paroles, which denied the application. See Pet. 6. State prosecutors subsequently moved in state court to have Soria examined by a psychologist, but no evaluation was conducted because Soria refused to cooperate. See Pet. 6-7. Soria eventually met with the defense psychologist, who concluded that he was not mentally competent to be executed. See Pet. 7. On July 25, 2000, the day Soria met with the defense psychologist, this Court denied his petition for certiorari and his motion for a stay of execution. See *Soria* v. *Johnson*, 530 U.S. 1286 (2000).

On July 26, 2000, petitioners filed a motion to determine competency in a Texas state court. Petitioners also filed pleadings in the Texas Court of Criminal Appeals, the United States Court of Appeals for the Fifth Circuit, and this Court. See Pet. 7; Pet. App. 29a.

This Court denied relief, *In re Soria*, 530 U.S. 1287 (2000), and Soria was executed that evening.

b. Following Soria's execution, petitioners each sought compensation from the district court for their representation of Soria in the clemency and competency proceedings. The district court initially authorized payment to Harris. See Pet. App. 13a-14a. On November 3, 2000, however, the district court ordered Taylor to show cause why his request for attorneys' fees and expenses should not be denied, and ordered Harris to show cause why the court should not vacate its prior approval of attorneys' fees and expenses, and why it should not order a refund of such payments. See Order to Show Cause 1-3 (Nov. 3, 2000). The order did not mention compensation for representation in competency-to-be-executed proceedings but referred only to compensation for representation in "a state clemency proceeding" or "state clemency proceedings." *Ibid.* On April 9, 2001, after considering petitioners' response, the district court entered an order denying Taylor's request for compensation and reimbursement, vacating its earlier approval of Harris's fees and expenses, and directing Harris to refund $7600 in fees and $290.78 in expenses. Pet. App. 13a-14a. That order also did not mention the request for compensation for the competency hearings but referred only to "State executive clemency proceedings" and "State clemency proceedings." *Ibid.*

c. Petitioners appealed. The court of appeals initially dismissed the appeal for want of jurisdiction. See Pet. App. 10a. Petitioners moved for reconsideration, however, and, following the court's decision in *Clark*, see *id.* at 1a-8a, the court granted the motion for reconsideration and reinstated petitioners' appeal. See *id.* at 9a-10a. The court explained that it was rein-

stating the appeal because, in *Clark*, see *id.* at 2a-5a, the court had concluded that it had appellate jurisdiction over an appeal from a district court order denying compensation under Section 848(q)(4)(B). *Id.* at 10a. Then, relying on its merits decision in *Clark*, the court held that the district court "correctly concluded that § 848(q)(8) [does] not authorize compensation for attorneys in state clemency and competency proceedings." *Ibid.* The court therefore affirmed the lower court's order denying compensation. *Ibid.*

DISCUSSION

The court of appeals correctly held that 21 U.S.C. 848(q) does not provide for federally appointed and funded counsel to represent state prisoners in state clemency proceedings. The court's decision does not squarely conflict with the decision of any other court of appeals, and it is consistent with the decisions of this Court. Accordingly, the Court should deny the petition for a writ of certiorari.[1]

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[1] The question whether Section 848(q) authorizes compensation for representation in state *competency-to-be-executed* (in addition to state *clemency*) proceedings is not properly presented. The district court's order to show cause in *Soria* referenced only claims for attorneys' fees and expenses in connection with a "state clemency proceeding" or "state clemency proceedings." See Order to Show Cause 1-3. Similarly, the district court's order denying Taylor's claim for compensation and directing Harris to refund payments already made referenced only "State executive clemency proceedings" or "State clemency proceedings." See Pet. App. 13a-14a. The order of the court of appeals referenced "competency" only in passing (*id.* at 10a), and its decision rested solely on its precedent in *Clark*, *id.* at 5a-8a, which involved only clemency proceedings. There is, accordingly, no reason for the Court to depart from its usual practice of "not decid[ing] in the first instance issues not decided below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999).

A. Section 848(q) Does Not Authorize Federally Appointed And Funded Counsel To Represent State Prisoners In State Clemency Proceedings

Petitioners incorrectly contend (Pet. 9-12) that 21 U.S.C. 848(q)(8) "plainly" provides for federally appointed counsel to represent state prisoners in state clemency and competency-to-be executed proceedings. When Section 848(q)(8) is construed in light of other relevant provisions of Section 848(q), it is clear that the statute does not authorize federally appointed and funded counsel to represent state prisoners in state proceedings.

Section 848(q) contains a variety of provisions related to appellate procedures in federal capital cases and the appointment and compensation of counsel in federal capital proceedings. Sections 848(q)(1)-(3) describe the appellate procedures that govern federal capital cases, and Sections 848(q)(4)-(10) are concerned with appointment and compensation of counsel. Section 848(q)(4) provides:

> (A) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time * * * shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).
>
> (B) In any post conviction proceeding under section 2254 or 2255 of Title 28 seeking to vacate

> or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

21 U.S.C. 848(q)(4). Paragraphs (5), (6), and (7) concern the qualifications that are required for appointed counsel, and paragraphs (9) and (10) concern reimbursement for necessary services and compensation of counsel. See 21 U.S.C. 848(q)(5)-(7), (9), (10). Section 848(q)(8), on which petitioners rely, concerns representation by counsel in proceedings subsequent to the collateral review proceedings for which counsel was appointed. It provides:

> Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

21 U.S.C. 848(q)(8).

Petitioners argue (Pet. 9-12) that the plain meaning of "such competency proceedings and proceedings for

executive or other clemency as may be available" in Section 848(q)(8) includes both state and federal proceedings. Accordingly, petitioners claim that they are entitled to compensation for representing Clark and Soria during their state clemency proceedings and Soria in competency-to-be-executed proceedings. See *Hill* v. *Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993) (affirming denial of compensation for representation in state clemency proceedings but establishing criteria for payment in future cases); *Gordon* v. *Vasquez*, 859 F. Supp. 413, 418 (E.D. Cal. 1994) (holding that, under plain meaning of statute, federally appointed attorneys are to be paid for representing defendant in state forums); *Strickler* v. *Greene*, 57 F. Supp. 2d 313, 315 (E.D. Va. 1999) (holding that statute entitles defendant to representation by federally paid attorneys in state clemency proceedings); *Lowery* v. *Anderson*, 138 F. Supp. 2d 1123, 1125-1126 (S.D. Ind. 2001) (same).

Petitioners' argument, however, incorrectly reads the language of Section 848(q)(8) in isolation from its context and the remaining provisions of Section 848(q). That approach ignores the well established principle that a statute must be read as a whole because "the meaning of statutory language, plain or not, depends on context." *Hollaway* v. *United States*, 526 U.S. 1, 7 (1999) (quoting *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), and *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). See, *e.g.*, *Pollard* v. *E.I du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2002); *Textron Lycoming Reciprocating Engine Div.* v. *United Automobile Workers*, 523 U.S. 653, 657 (1998); *Bailey* v. *United States*, 516 U.S. 137, 145 (1995).

The surrounding provisions of Section 848(q) leave no doubt that the Section is concerned with the conduct of *federal* capital review proceedings. As noted above,

Sections 848(q)(1) through (3) specify the procedures governing appellate review of capital cases. Those provisions plainly apply only to federal cases, even though they nowhere use the adjective "federal" to limit their scope. Section 848(q)(4)(A) also contains an implicit limitation to federal cases. It mandates appointment of counsel for indigent defendants "in every criminal action in which a defendant is charged with a crime which may be punishable by death" (21 U.S.C. 848(q)(4)(A)), but Congress obviously did not intend for federal courts to appoint, and the federal government to fund, counsel in state capital trials and direct appeals. Section 848(q)(4)(B), the provision under which petitioners were appointed, also deals only with federal proceedings: it authorizes appointment of counsel only in federal collateral review proceedings under 28 U.S.C. 2254 and 2255. See 21 U.S.C. 848(q)(4)(B). In addition, Sections 848(q)(5) and (6), which establish minimum qualifications for appointed counsel, contemplate that counsel will represent the defendant in federal, not state, proceedings because they require that counsel have experience in the relevant federal courts. See 21 U.S.C. 848(q)(5) ("at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is tried for not less than five years"); 21 U.S.C. 848(q)(6) ("at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years").

In light of Section 848(q)'s focus on federal capital cases and on state capital cases only insofar as they are subject to collateral attack in the federal courts, those courts that have read Section 848(q) as a whole have confined the scope of Section 848(q)(8) to proceedings in federal forums. See *Sterling*, 57 F.3d at 458; *Lindsey*, 875 F.2d at 1506; see also *King* v. *Moore*, No.

02-13717-P (11th Cir. July 24, 2002) (denying appointment of counsel to pursue state clemency proceedings based on *Lindsey* and *Clark*).

That construction of Section 848(q)(8) is also supported by traditional principles of both statutory interpretation and federalism. It is well settled that "Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999); see *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 543 (1994) (applying that principle in construing the bankruptcy code); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 693-694 (1983) (applying that principle in construing statute governing attorney's fee award). Petitioners have provided no evidence—and the government is aware of none—that Congress has *ever* authorized the federal courts to appoint, and the federal government to fund, counsel to pursue state remedies in state clemency or competency-to-be-executed proceedings. Accordingly, the reading of Section 848(q) advanced by petitioners would be a radical departure from past practice, and the Fifth and Eleventh Circuits correctly declined to adopt that reading without a clearer indication of congressional intent. See, *e.g.*, *Sterling*, 57 F.3d at 457 ("we are reluctant to say that § 848(q)(8) should be read to express congressional intent for so sweeping an idea that the federal government will pay attorneys for a state defendant to pursue state remedies in state courts").

Closely related considerations of federalism likewise support that conclusion. Just as Congress does not undertake a radical departure from past practice without making its intent clear, it is presumed not to alter the federal-state balance without a similarly clear expression of intent. See *United States* v. *Bass*, 404 U.S.

336, 349 (1971); *FTC* v. *Bunte Bros.*, 312 U.S. 349, 351, 354-355 (1941); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 513 (1940). Where statutory intent is ambiguous, the Court will not attribute to Congress an intent to intrude on state governmental functions. See *Raygor* v. *Regents of the Univ. of Minn.*, 122 S. Ct. 999, 1007 (2002); *Gregory* v. *Ashcroft*, 501 U.S. 452, 470 (1991). This principle "is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461.

In the present case, as two courts of appeals, including the court below in an earlier case, have recognized, see *Lindsey*, 875 F.2d at 1506-1507; *Sterling*, 57 F.3d at 457-458, the interpretation of Section 848(q) advanced by petitioners would dramatically alter the traditional federal-state balance. As the court said in *Sterling*, 57 F.3d at 457, in the context of the proposed federal appointment of counsel to pursue unexhausted state remedies:

> It would seem indelicate on our part, absent an express intent on the part of Congress, to permit intrusion into the state judicial process by having lawyers who are practicing before state courts, representing state court defendants and petitioners pursuant to state court rules, to have their qualifications set by federal statute (21 U.S.C. § 848(q)(5), (6)) and to be answerable, at least in part, to federal judges for their conduct. Counsel who are appointed and qualified and whose pay is approved by federal judges are ultimately controlled by and responsible to federal courts. It is not too difficult to see that the hand of the federal

> court may well find its way further into state court proceedings and the independence of state courts unnecessarily interfered with and compromised thereby.

Such concerns about federalism apply with equal force in the context of clemency proceedings.

Although Texas disclaimed any interest or role in the instant case, see Pet. ii, other States might reasonably be concerned that the federal courts would encroach upon state sovereignty if the federal government appointed and paid for counsel for state death row prisoners who are pursuing state remedies in state forums. The conduct of the State of California in *Gordon* v. *Vasquez*, *supra*, is instructive. In that case, the issue was whether the district court would provide federal funds to a state capital habeas corpus petitioner to investigate unexhausted state claims. The court initially ordered the Attorney General of California to brief the issue, but then concluded that the State was not an interested party, ordered that the State's briefing and appearance be stricken, and remanded the case to a federal magistrate judge. See 859 F. Supp. at 415. California, however, did not acquiesce in the court's finding that it was not an interested party, but rather sought to appeal the order striking its appearance. See *ibid.*[2]

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[2] Petitioners argue (Pet. 11-12) that the statutory phrase "proceedings for executive or other clemency as may be available to the defendant" (Section 848(q)(8)) must encompass state clemency proceedings because only executive clemency is available in the federal system. Congress may, however, have included the words "or other" to ensure counsel not just in those clemency proceedings currently available in the federal system but also in whatever federal clemency proceedings might become available. Absent any other support for the view that Congress intended Section 848(q)

B. The Court of Appeals' Decision Does Not Directly Conflict With The Eighth Circuit's Decision In *Hill* v. *Lockhart*

Contrary to petitioners' contention (Pet. 13-17), there is no direct conflict among the courts of appeals on the question presented in the petition. In *Hill*, 992 F.2d at 803-804, the court *affirmed* the district court's *denial* of compensation to the counsel-claimant. The portion of the opinion on which petitioners rely was therefore essentially advisory, establishing conditions under which compensation might be available in the future.[3]

Moreover, the Eighth Circuit in *Hill* interpreted an earlier version of Section 848(q) than the one the Fifth Circuit interpreted in this case. That version of the statute provided that counsel would be compensated only for services that were "reasonably necessary." See 21 U.S.C. 848(q)(10) (1988); *Hill*, 992 F.2d at 803. Based on that language, and the court's concern that a "state that has elected to impose the death penalty should provide adequate funding for the procedures it has adopted to properly implement that penalty," the court established three prerequisites for compensation

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to authorize federally appointed and funded counsel in state proceedings, Congress's inclusion of the phrase "or other" is not a sufficiently clear indication of Congressional intent to depart radically from past practice and to encroach upon traditional principles of federalism in that fashion.

[3] District courts in the Eighth Circuit are generally compensating counsel for representation in state proceedings when the criteria set out in *Hill* are satisfied. See, *e.g.*, *Lingar* v. *Bowersox*, No. 89-1954-C-7 (E.D. Mo. May 11, 2000) (order granting motion for attorney's fees for representation in state clemency proceedings); *Rodden* v. *Delo*, No. 91-0384-CV-W-9 (W.D. Mo. Feb. 11, 1999) (approving compensation for counsel to seek executive clemency from Governor of Missouri).

for services performed in connection with state clemency and competency-to-be-executed proceedings: (1) the underlying federal habeas petition must not be frivolous: (2) state law must not provide for compensation for such services; and (3) in most cases, the request for compensation must precede the performance of the services. *Ibid.* As petitioner notes (Pet. 13-14 n.3), under the current version of Section 848(q), the "reasonably necessary" limitation is no longer included in the provision governing compensation for counsel's time. See 21 U.S.C. 848(q)(10). It is far from clear that the Eighth Circuit would construe Section 848(q) to authorize compensation by the federal government for counsel's services in connection with state proceedings absent a statutory provision that supports the three limitations that the court believed necessary to prevent abuse of such a funding provision. Thus, it is not certain that the Eighth Circuit would interpret the current version of Section 848(q) to authorize compensation for representation in state proceedings.

In any event, there is no evidence that either petitioner requested compensation before representing Clark and Soria in their respective state clemency and competency-to-be-executed proceedings. It therefore appears that the Eighth Circuit, if it had applied *Hill*, would have denied petitioners' requests for compensation. Because petitioners would not be entitled to compensation even under the Eighth Circuit's approach, this case is not an appropriate vehicle to resolve any tension between that approach and the approach of the Fifth and Eleventh Circuits.

C. The Court of Appeals' Decision Is Fully Consistent With *McFarland* v. *Scott*

Petitioners also mistakenly contend (Pet. 18-22) that the decision of the court of appeals "runs counter" to this Court's decision in *McFarland* v. *Scott*, 512 U.S. 849 (1994). *McFarland* did not address whether Section 848(q) authorizes federally appointed counsel to represent state prisoners in state proceedings. *McFarland* held only that a state capital defendant may invoke his right under Section 848(q)(4)(B) to appointed counsel in *federal* habeas corpus proceedings before filing a full, formal habeas petition by moving for the appointment of habeas counsel, and that a district court may enter a stay of execution to permit that invocation. 512 U.S. at 859.

To the extent that *McFarland* has any relevance to the question presented in this case, it counsels against petitioners' proposed interpretation of Section 848(q). Petitioners' interpretation would permit abuse of the Court's holding in *McFarland* that counsel may be appointed before a federal habeas petition is actually filed. Under petitioners' interpretation, a state capital defendant who had not yet exhausted his available state remedies could file a motion in federal court for the appointment of habeas counsel under Section 848(q)(4)(B) and, once federal habeas counsel was appointed, use that counsel to pursue his unexhausted state claims in state court. It was the potential for such abuse of the right at issue in *McFarland* that led to two courts of appeals to reject the interpretation of Section 848(q)(8) that petitioners now propose. See *Lindsey*, 875 F.2d at 1506-1507; *Sterling*, 57 F.3d at 456-458. There is therefore no merit to petitioners' claim that

the decision of the court of appeals "runs counter" to this Court's decision in *McFarland*.

Petitioners advance policy arguments (Pet. 22-27) that counsel play an important role in state clemency and competency proceedings. But those policy arguments are properly addressed to state legislatures, rather than to this Court. It is up to the States, and not the federal government, to determine whether counsel should be appointed to represent indigent state prisoners in state proceedings related to state-imposed death sentences and to defray the costs of a decision that counsel should be provided. In fact, many States already provide compensation for representation in state clemency and competency-to-be-executed proceedings, either by statutes or rules that specifically address such representation[4] or as part of the general responsibilities of the state public defender office.[5]

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[4] See, *e.g.*, Cal. Sup. Ct. Policies Regarding Cases Arising from Judgments of Death, Policy 3, § 2.1 (Jan. 16, 2002) (clemency and competency); Colo. Rev. Stat. § 16-8-303(1)(b) (2001) (competency); Fla. Stat. Ann. §§ 27.702, 922.07, 925.035(4) (West 2001 & Supp. 2002) (clemency and competency); N.M. R. Crim. P. 5-802(F)(1) NMRA (2002) (habeas corpus actions, which include competency claims); N.Y. Correct. Law § 656(3) (McKinney 1987 & Supp. 2000) (competency); Ohio Rev. Code Ann. § 2949.28(B)(3) (Anderson 1999) (competency); Tenn. Code Ann. § 40-30-306 (1997) (clemency and competency); Wyo. Stat. Ann. § 7-13-902(h) (Michie 1977 & Supp. 1995) (competency).

[5] See, *e.g.*, Ky. Rev. Stat. Ann. § 31.010 (Michie 1998) (interpreted to cover competency); N.C. Gen. Stat. § 7A-451(c) (1999 & Supp. 2000) (post-conviction remedies, which include competency proceedings); N.C. Indigent Defense Service Rule 2C.2 (interpreted to cover clemency and competency); Pa. R. Crim. P. 904(C) (interpreted to cover competency); Utah Code Ann. § 78-35a-202 (1996 & Supp. 2002) (same); Va. Code Ann. § 19.2-163.7 (Michie

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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2000 & Supp. 2001) (same); Wash. Rev. Code Ann. § 10.73.150(3) (West 2002) (same).

(H)
Supreme Court, U.S.
FILED
NOV 15 2002

No. 01-1605

In The
Supreme Court of the United States

IN RE: GARY A. TAYLOR AND WILLIAM S. HARRIS,

Petitioners.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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TABLE OF CONTENTS

Page

LIST OF SUPPLEMENTAL APPENDICES ii

TABLE OF AUTHORITIES iii

DISCUSSION 1

1. The circuits are split and the issue is exceedingly important 2

2. The plain language of § 848(q) is in harmony with the text and purpose of the entire statute, and raises no legitimate federalism concerns 6

CONCLUSION 10

LIST OF SUPPLEMENTAL APPENDICES

A. Order of the United States Court of Appeals for the Fifth Circuit, denying motion for appointment of counsel, *King v. Moore*, No. 02-13717-P, filed June 24, 2002 ..... 1a

B. Approval Letter, Counsel's Voucher and Excerpts from Counsel's Timesheets, *Coleman v. Mitchell*, No. 98-3545 (6th Cir.)..... 3a

C. Orders of the United States District Courts for the Eastern and Western Districts of Missouri and the Eastern District of Arkansas, approving funds for clemency representation..... 8a

TABLE OF AUTHORITIES

Page

CASES:

62 Cases of Jam v. United States, 340 U.S. 593 (1951) 6

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) 10

Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176 (1982) 6

Clark v. Johnson (In re: Taylor), 278 F.3d 459 (5th Cir. 2002) 5

Coleman v. Mitchell, 268 F.3d 417 (6th Cir. 2001) 4

FTC v. Bunte Bros., 312 U.S. 349 (1941) 10

Furman v. Georgia, 408 U.S. 238 (1972) 7, 8

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 8

Gregory v. Ashcroft, 501 U.S. 452 (1991) 10

Herrera v. Collins, 506 U.S. 390 (1993) 7

Hill v. Lockhart, 992 F.2d 801 (8th Cir. 1993) 2, 3, 4

King v. Moore, No. 02-13717-P (11th Cir. July 24, 2002) 2

Lowery v. Anderson, 138 F. Supp. 2d 1123 (S.D. Ind. 2001) 3

Maine v. Thiboutout, 448 U.S. 1 (1980) 9

McFarland v. Scott, 512 U.S. 849 (1994) 1, 7, 8

Nelson v. Adams USA, Inc., 529 U.S. 460 (2000) 5

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 5

TABLE OF AUTHORITIES – Continued

Page

Raygor v. Regents of the Univ. of Minn., 534 U.S. 533 (2002) 10

Strickler v. Greene, 57 F. Supp. 2d 313 (E.D. Va. 1999) 3

United States v. Bass, 404 U.S. 336 (1971) 10

CONSTITUTIONAL PROVISIONS:

U.S. CONST., art. II, §2, cl. 1 8

U.S. CONST., amend. VIII 1

STATUTES:

21 U.S.C. §848(q) ..... *passim*

21 U.S.C. §848(q)(4)(B) 9

21 U.S.C. §848(q)(8) ..... *passim*

Former 21 U.S.C. §848(q)(10) 3

28 U.S.C. §2254 ..... 3, 7, 8

28 U.S.C. §2255 ..... 7, 8

42 U.S.C. §1988 9

42 U.S.C. §§2996, *et seq.* 9

OTHER AUTHORITIES:

Brief of the States of California, et al. as *Amici Curiae*, *McFarland v. Scott*, No. 93-6497 ..... 2, 8

Executions in the U.S. 2002, available at: http://www.deathpenaltyinfo.org/dpicexec02.html 4

Upcoming Executions, available at: http://www.deathpenaltyinfo.org/executionalert.html 4

SUPPLEMENTAL BRIEF

This supplemental brief is filed in response to the invited Brief for the United States as *Amicus Curiae*, and also presents additional materials (previously provided to the Solicitor General) that underscore the split among the circuits.

DISCUSSION

We must remember what is at stake here. Clemency is the failsafe in our criminal justice system; in certain circumstances, it alone can prevent a miscarriage of justice. The Eighth Amendment forbids the execution of those who are not sufficiently competent to understand that they are about to be executed. Nowhere in its brief does the United States dispute the central importance of clemency or competency procedures or the need for lawyers for individuals who face the sanction of death.

This is a straightforward case. By seeking to implement 21 U.S.C. § 848(q), the petitioners do no more than ask the Court to enforce the plain meaning of the statute as understood by twenty-five death penalty states. In *McFarland v. Scott*, 512 U.S. 849 (1994), these states told this Court:

> "[W]here Congress intended the 1988 amendments to affect state proceedings, it clearly knew how to accomplish this result. One provision provides that counsel appointed under the 1988 amendments 'shall also represent the defendant in . . . proceedings for executive or other clemency as may be available to the defendant.' 21 U.S.C. § 848(q)(8). Clemency proceedings usually follow the conclusion of post-conviction proceedings and typically occur on the eve of a scheduled execution. Congress likely concluded that appointed counsel – who by the time of any clemency proceedings would be intimately familiar with the facts and legal questions of a case –

> should be under a duty to assist with this stage of the capital case."

Brief of California, et al. as *Amici Curiae*, *McFarland v. Scott*, No. 93-6497 (filed Feb. 14, 1994), at 25. The language of the statute is clear and it should be the uniform law of the land.

1. The circuits are split and the issue is exceedingly important.

In the cases below, the Fifth Circuit ruled that there is no right to appointed counsel under § 848(q) in state clemency or competency proceedings. *See* Petition for Writ of Certiorari ("Pet.") 5, 8, 15; Pet. App. 8a, 10a. As the United States concedes, the Eleventh Circuit is aligned with the Fifth. *See* Brief for The United States as *Amicus Curiae* (filed Nov. 6, 2002) ("Gov.Br.") 11-13; Order, *King v. Moore*, No. 02-13717-P (11th Cir. July 24, 2002) (reprinted *infra* at 1a-2a). By contrast, the Eighth Circuit has held that the plain language of § 848(q) "insure[s] that indigent state petitioners receive 'reasonably necessary' competency and clemency services from appointed, compensated counsel." *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993). Contrary to the government's assertion (*see* Gov.Br. 15-16), *Hill* directly conflicts with the Fifth and Eleventh Circuits.

First, *Hill* speaks in mandatory language: if the lawyer has filed a non-frivolous federal habeas corpus petition, and counsel seeks appointment in clemency or competency proceedings and shows that state funding is unavailable, appointment and compensation are required. *See Hill*, 992 F.2d at 803. That is precisely how *Hill* has been interpreted by the district courts within the Eighth Circuit. As the orders reprinted in the Supplemental Appendix (*infra*, 8a-25a) make clear, appointment and compensation under § 848(q) for state clemency representation have now become routine in federal courts in Missouri and Arkansas, by far the most active death penalty states within the Eighth Circuit. And federal

district courts in other states read and apply *Hill* this way too. *See Lowery v. Anderson*, 138 F. Supp. 2d 1123, 1125-26 (S.D. Ind. 2001); *Strickler v. Greene*, 57 F. Supp. 2d 313, 316-17 (E.D. Va. 1999).

Second, as the petition points out, the *Hill* court ruled that these procedural requirements should be met before state competency or clemency representation can be considered "reasonably necessary" under former 21 U.S.C. § 848(q)(10). The statute has since been amended to remove the requirement that the district court make a specific determination that the attorney's time was "reasonably necessary." *See* Pet. 13-14 n.3; *Hill*, 992 F.2d at 803. The government speculates that in light of the amendment, the Eighth Circuit might decline to authorize clemency and competency representation. *See* Gov.Br. 16. But this argument turns this amendment on its head. By removing a *barrier* to compensation for an attorney's time, Congress only made the mandatory duty to provide clemency and competency counsel even clearer. Congress left intact the requirement that counsel appointed for the 28 U.S.C. § 2254 petition "*shall* also represent the defendant" in clemency and competency proceedings. § 848(q)(8) (emphasis added). Inasmuch as appointed habeas counsel "shall" provide clemency and competency representation for an indigent state capital defendant, a judicial determination that such representation is "reasonably necessary" would be redundant for the defendant who has no other ability to obtain counsel.[1]

Third, the government proposes that had counsel for Mr. Clark and Mr. Soria sought compensation in the Eighth Circuit, their request would have been denied

[1] As explained *infra* at page 9, even though the statute has been amended, it would be proper for a district court to ask appointed counsel to demonstrate that no state funds are available and that counsel has filed a non-frivolous habeas corpus petition before seeking reimbursement for clemency and competency representation.

because "there is no evidence" that they followed the *Hill* procedures. *See* Gov.Br. 16. This argument is a diversion, as the Fifth Circuit unequivocally ruled that the statute does not provide for clemency or competency representation at all. Even so, there is no doubt that the petitioners provided clemency and competency representation after litigating non-frivolous habeas corpus petitions, and there is no whisper of a suggestion that Texas actually provides money for this work. The government is left with the sole objection that counsel failed to seek prior court approval for representation that the statute itself requires.

The holdings of the Fifth and Eleventh Circuits directly conflict with that of the Eighth Circuit. And it now appears that the Sixth Circuit follows the Eighth. The Sixth Circuit recently approved payment for one of Alton Coleman's appointed lawyers for federal habeas corpus and state clemency representation. The court's approval letter, counsel's voucher and excerpts from counsel's timesheets are reprinted *infra* at 3a-7a.[2]

The issue at hand is pressing, and the Court should not postpone addressing it. The petition in this case was filed on April 25, 2002. Between April 25 and November 11, the United States executed thirty-five men and women, twenty in Texas alone. Texas has twelve executions scheduled between November 19, 2002 and February 25, 2003.[3]

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[2] Mr. Coleman had several cases, which were consolidated and severed at different points in time. *See Coleman v. Mitchell*, 268 F.3d 417, 425 n.2 (6th Cir. 2001). It is clear from the timesheets and the docket number that this is his state conviction from Ohio, and the clemency proceedings were before state authorities. Mr. Coleman was executed by the State of Ohio on April 26, 2002. *See Executions in the U.S. 2002*, available at: http://www.deathpenaltyinfo.org/dpicexec02.html (last visited November 10, 2002).

[3] *See Executions in the U.S. 2002, supra*; *Upcoming Executions*, available at: http://www.deathpenaltyinfo.org/executionalert.html (last visited November 10, 2002).

The circuits are split, the issue is of surpassing importance, and review should be granted to ensure that more indigent defendants are not put to death without lawyers to assure meaningful clemency and competency review.[4]

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[4] In a footnote in its brief, the United States suggests that the question of the application of the statute to competency-to-be-executed proceedings may not be properly presented. *See* Gov.Br. 7 n.1. The government is wrong on both the facts and the law.

With respect to the facts, counsel in *Soria* clearly informed the district court that they were seeking compensation for competency representation, and counsel described their competency work in great detail. *See* Pet. App. 27a-31a. The court clearly rejected counsels' request for compensation for the competency work. *See* Pet. App. 13a-15a; Payment Voucher and Out of Court Hourly Worksheet submitted Sept. 14, 2000 by William Harris; Payment Voucher and CJA Form 30 Worksheet submitted Oct. 24, 2000 by Gary Taylor. On appeal, the court of appeals correctly described the district court's holding and the question before the circuit: "whether district court [sic] correctly concluded that § 848(q)(8) did not authorize compensation for attorneys in state clemency *and competency* proceedings." Pet. App. 10a (emphasis added). Though the Fifth Circuit found that *Clark v. Johnson* (*In re: Taylor*), 278 F.3d 459 (5th Cir. 2002) was controlling in resolving this issue, that court clearly recognized that the question of competency representation was before it, just as that question had been before the district court.

With respect to the law, even if the two lower courts had mischaracterized counsels' requests as relating only to clemency representation, that mischaracterization could not prevent this Court from reaching the issue. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (an issue is preserved for review when the lower court is "fairly put on notice" of its substance); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 n.24 (1979) ("The failure of the Court of Appeals to address the statutory issue decided by the District Court does not, of course, prevent this Court from reaching the issue.")

2. The plain language of § 848(q) is in harmony with the text and purpose of the entire statute, and raises no legitimate federalism concerns.

Section 848(q)(8) uses mandatory and expansive language: a state capital defendant who files a federal habeas corpus petition is entitled to appointed counsel for that case and, unless replaced, the same lawyer *shall* continue to represent the defendant in *such* clemency and competency proceedings *as may be available*. Given that the only clemency proceedings available to a state defendant are those before a state authority, the choice of mandatory and expansive language by Congress plainly requires that appointed and compensated counsel continue to represent the client in these subsequent state proceedings. The government argues that after reviewing the entire statute, this Court should rewrite § 848(q)(8) to supply some missing terms. "Such competency proceedings" should read "such *federal* competency proceedings," and "proceedings for executive or other clemency" should be modified to read "*federal* proceedings for executive or other clemency *that may be created in the future*." But "Congress expresses its purpose by words. It is for [this Court] to ascertain – neither to add nor to subtract, neither to delete nor to distort." *Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 190 n.11 (1982) (quoting *62 Cases of Jam v. United States*, 340 U.S. 593 (1951)). But the overall statute affords no basis to rewrite the section. Further, the operation of the statute – properly understood – raises no substantial federalism concerns, which may well explain why the State of Texas has expressly disclaimed any interest in this case.

The plain language of § 848(q)(8) fits seamlessly with the overall purpose and scheme of § 848(q). Section 848(q) revised the federal death penalty, and at the same time expressly addressed the need for counsel for state and federal capital defendants. Section 848(q)(8) sets forth the right to counsel for people convicted in capital cases who

seek federal post-conviction relief, including state prisoners, as this Court affirmed in *McFarland*. *See id.*, 512 U.S. at 854. Additionally, this Court acknowledged that Congress sought to provide "quality legal representation" to indigent state petitioners due to the "seriousness of the possible penalty" and the "unique and complex nature" of capital defense. *Id.* at 855 (quoting 21 U.S.C. § 848(q)(7)).

The government argues that the "remaining provisions" of § 848(q) undercut the plain language of § 848(q)(8) because many of them refer to procedures available only to federal criminal defendants. *See* Gov.Br. 8-12. The statute revised the federal death penalty in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), and the government is correct that several statutory provisions apply only in federal prosecutions. Nevertheless, Congress expressly required counsel for both state and federal death-sentenced prisoners from the point they file their petitions for federal post-conviction relief, and in all proceedings thereafter. Section 848(q) treats federal and state capital defendants equally from the moment they seek § 2254 or § 2255 relief. In a change from prior law, both are now entitled to counsel in these post-conviction proceedings. And the same lawyer must, unless replaced, continue to represent the client in clemency and competency proceedings.

This statutory scheme makes sense. Congress was fully aware – as this Court is aware – that clemency and competency proceedings generally arise *after* state and federal habeas corpus efforts are concluded,[5] and that these are vital and unique proceedings. Additionally, clemency and competency review often depends upon the facts of the underlying litigation, leaving the current

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[5] *See, e.g., Herrera v. Collins*, 506 U.S. 390, 411-12 (1993) ("Clemency . . . is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.").

counsel in the best position to represent the client. *See* Brief of California et al., *McFarland v. Scott*, at 25. Far from contravening the context of the statute, continuous legal representation for these unique and complex matters effectuates and is consistent with the overall purpose of the statute.

Because § 848(q)(8) is part of a comprehensive scheme, the government also goes astray when it insists that Congress would not have intended a "radical departure" without a "clearer indication of congressional intent." *See* Gov.Br. 12. What this argument fails to recognize is that all of § 848(q) was a break from past practice; the statute created the post-*Furman* federal death penalty and sought to shore up protections for all capital defendants, state *and* federal, in post-conviction and other proceedings. Viewing § 848(q)(8) in context, as the government reminds us to do, reveals an unmistakable congressional intent to modify past practice.[6]

Further, § 848(q) raises no substantial federalism concerns. Section 848(q)(8) provides counsel in such

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[6] One other "plain meaning" point bears mentioning. While federal clemency is exclusively executive (*see* U.S. CONST., art. II, § 2, cl. 1), the states have other forms of clemency. *See* Pet. 11-12. The Court must presume that Congress was aware of the practice in the states when it enacted § 848(q). *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (presuming that Congress was aware of the contours of state workers' compensation schemes in enacting federal legislation). By providing for counsel in "executive *or other clemency* as may be available to the defendant," Congress must have intended to encompass state proceedings, the only clemency proceedings that can be "other" than executive. The government attempts to give meaning to "other clemency" by suggesting that Congress was leaving open the possibility that other forms of federal clemency "might become available." *See* Gov.Br. 14 n.2. It strains credulity to believe that Congress included the phrase to keep open the possibility of a constitutional amendment.

clemency and competency proceedings "as may be available." Thus, the statute merely affords funding for counsel in proceedings that already exist under the laws of each state. This is not an unusual concept. Congress established the Legal Services Corporation, which provides legal assistance for poor people in state and federal court. *See* 42 U.S.C. §§ 2996, *et seq.* Further, in 42 U.S.C. § 1988, Congress provided for attorneys' fees in civil rights cases, including litigation brought in state courts. *See Maine v. Thiboutout*, 448 U.S. 1, 10-11 (1980). Section 848(q) does not require the states to establish any new procedures or to take any action whatsoever.

Moreover, § 848(q) does not interfere with any efforts by the states to provide counsel on their own. While the government has identified several states that do provide compensation for state clemency and competency-to-be-executed representation (*see* Gov.Br. 18), Texas and many other active death penalty states do not. The statute addresses this gap but does not undermine any funding efforts in the states. Section 848(q)(4)(B) provides for counsel when a defendant is "financially unable to obtain adequate representation or . . . other reasonably necessary services." If a state affords adequate counsel for state clemency or competency proceedings, the defendant is not "unable to obtain" such services, and is thus not entitled to federally-funded counsel. The district courts can require appointed counsel to show that funds are unavailable from the state when counsel submit their requests for reimbursement under § 848(q).

Finally, though the government cites several cases calling for a clear expression of intent before altering the federal-state balance (*see* Gov.Br. 12-13), the government's cases relate to proposed interpretations of federal statutes

that would actually intrude on state functions to a kind and degree not present here.[7] There is no tension between § 848(q) and state procedures. The federalism claim is a phantom.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GARY A. TAYLOR
WILLIAM S. HARRIS

Petitioners

CHARLES D. WEISSELBERG
Counsel of Record
ELISABETH SEMEL
DEATH PENALTY CLINIC*

RONALD W. BREAUX
SARAH TEACHOUT
HAYNES AND BOONE

Attorneys for Petitioners
Gary A. Taylor and
William S. Harris

Berkeley, California
November 2002

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[7] *See Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533 (2002) (tolling statute of limitations for state law claims against nonconsenting states); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (interfering with state law qualifications for state judges); *United States v. Bass*, 404 U.S. 336 (1971) (federal criminal liability for conduct traditionally made criminal by the states); *FTC v. Bunte Bros.*, 312 U.S. 349 (1941) (FTC jurisdiction over purely local business); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) (application of the Sherman Act to a purely local strike).

* Francis Martin and Sarah Ray, law students at the University of California School of Law (Boalt Hall), assisted in preparing this brief.

SUPPLEMENTAL APPENDIX A
[Order]

(Filed July 24, 2002)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-13717-P

AMOS LEE KING,

Petitioner-Appellant,

versus

MICHAEL W. MOORE, Secretary,
Florida Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Appellant's motion for appointment of counsel is DENIED. For background, see *In re Lindsey*, 875 F.2d 1502, 1506-07 (11th Cir. 1989) (concluding 21 U.S.C. § 848(q) does not require appointment of counsel for death-row inmates in state post-conviction proceedings); *Clark v. Johnson*, 278 F.3d 459, 462 (5th Cir. 2002) (attorney is not entitled to compensation under § 848(q) for representation of inmate during state clemency proceedings).

Appellant's petition for certificate of appealability under 28 U.S.C. § 2253(c)(1)(B) is DENIED as unrequired.

For background, see *Weeks v. Jones*, 100 F.3d 124, 127 n.6 (11th Cir. 1996) (CPC is not required to appeal denial of appointment of counsel under § 848(q)(4)(B)); *Fuller v. Johnson*, 114 F.3d 491, 501 n.4 (5th Cir. 1997) (COA not needed for appeal under § 848(q)(4)(B)).

/s/ J.L. Edmondson
CHIEF JUDGE

SUPPLEMENTAL APPENDIX B
[Approval Letter, Counsel's Voucher and Excerpts from Counsel's Timesheets]

UNITED STATES COURT OF APPEALS
for the Sixth Circuit
100 East Fifth Street, Room 532
Potter Stewart U.S. Courthouse
Cincinnati, Ohio 45202-3988
[letterhead omitted]

Filed: June 7, 2002

David Stebbins
330 South High St.
Columbia, Ohio 43215

RE: 8-3945
Voucher No.

Dear Counsel:

The court has approved your CJA Form 20 for compensation of attorney time in the amount of $20,212.50 and expenses in the amount of $430.20 for a total of $20,642.70. The form has been forwarded to the Administrative Office of the United States Courts for payment. A copy is enclosed for your information.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

Leonard Green, Clerk

/s/

(Mrs.) Ehrlich
CJA Deputy Clerk
Direct Dial: 513-564-7078

Enclosure

[Handwritten notation omitted]

Criminal Justice Act Voucher submitted by David Stebbins
to the United States Court of Appeals for the Sixth Circuit
for representation of Alton Coleman,
including state clemency proceedings

1. CIR./DIST./DIV. CODE	2. PERSON REPRESENTED	VOUCHER NUMBER
06C	Coleman, Alto	

3. MAG. DKT./DEF. NUMBER	4. DIST. DKT./DEF. NUMBER	5. APPEALS DKT./DEF. NUMBER	6. OTHER DKT. NUMBER
		X:98-003545-001	

7. IN CASE/MATTER OF (Case Name)	8. TYPE PERSON REPRESENTED	9. REPRESENTATION TYPE
U.S. v. Coleman	Other:	Capital Habeas Corpus

10. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) If more than one offense, list (up to five) major offenses charged, according to severity of offense.

11. ATTORNEY'S NAME (First Name, M.I., Last Name, including any suffix) AND MAILING ADDRESS

Stebbins, David
330 South High Street
Columbus OH 43215

Telephone Number: (614) 224-7291

13. NAME AND MAILING ADDRESS OF LAW FIRM (only provide per instructions)

12. COURT ORDER

- ☒ O Appointing Counsel
- ☐ F Subs For Federal Defender
- ☐ P Subs For Panel Attorney
- ☐ C Co-Counsel
- ☐ R Subs For Retained Attorney
- ☐ Y Standby Counsel

Prior Attorney's Name: _____

Appointment Date: _____

(A) Because the above-named person represented has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in Item 11, who has been determined to possess the specific qualifications required by law, is appointed to represent this person in this case.

(B) The attorney named in Item 11 is appointed to serve as: ☐LEAD COUNSEL ☐CO-COUNSEL

Name of Co-Counsel or Lead Counsel: _____

Appointment Date: _____

(C) If you represented the defendant or petitioner in any prior proceeding related to this matter, attach to your initial claim a listing of those proceedings and describe your role in each (e.g., lead counsel or co-counsel).

☐ (D) Due to the expected length of this case, and the anticipated hardship on counsel in undertaking representation full-time for such a period without compensation, interim payments of compensation and expenses are approved pursuant to the attached order.

Signature of Presiding Judicial Officer or By Order of the Court

Date of Order: 12/15/2000

Nunc Pro Tunc Date: _____

(E) Repayment or partial repayment ordered from the person represented for this service at time of appointment. ☐YES ☐NO

CLAIM FOR SERVICES AND EXPENSES

14. STAGE OF PROCEEDING
Check the box which corresponds to the stage of the proceeding during which the work claimed at Item 15 was performed even if the work is intended to be used in connection with a later stage of the proceeding. CHECK NO MORE THAN ONE BOX. **Submit a separate voucher for each stage of the proceeding.**

CAPITAL PROSECUTION
- a. ☐ Pre-Trial
- b. ☐ Trial
- c. ☐ Sentencing
- d. ☐ Other Post Trial
- e. ☐ Appeal
- f. ☐ Petition for the U.S. Supreme Court Writ of Certiorari

HABEAS CORPUS
- g. ☐ Habeas Petition
- h. ☐ Evidentiary Hearing
- i. ☐ Dispositive Motions
- j. ☐ Appeal
- k. ☑ Petition for the U.S. Supreme Court Writ of Certiorari

OTHER PROCEEDING
- l. ☑ Stay of Execution
- m. ☐ Appeal of Denial of Stay
- n. ☐ Petition for Writ of Certiorari to the U.S. Supreme Court Regarding Denial of Stay
- o. ☑ Other

HOURS AND COMPENSATION CLAIMED — FOR COURT USE ONLY

15. CATEGORIES (Attach itemization of services with dates)	HOURS CLAIMED	TOTAL AMOUNT CLAIMED	MATH/TECH ADJUSTED HOURS	MATH/TECH ADJUSTED AMOUNT	ADDITIONAL REVIEW
a. In-Court Hearings (Rate per Hour = $ 125.00)	2.0			IN COURT TOTAL (Category a)	IN COURT TOTAL (Category a)
b. Interviews and Conferences with Client	17.7				
c. Witness Interviews	0.0			125.00	
d. Consultation with Investigators and Experts	35.0				
e. Obtaining and Reviewing the Court Record	0.0				
f. Obtaining and Reviewing Documents and Evidence	0.0			OUT OF COURT TOTAL (Categories b - j)	OUT OF COURT TOTAL (Categories b - j)
g. Consulting with Expert Counsel	0.0				
h. Legal Research and Writing	161.1		82.30		
i. Travel	24.8				
j. Other (Specify on additional sheets)	0.0				
Totals: Categories b thru j (Rate per hour = $ 125.00)	240.6	$30,075.00	161.80	20,047.50	
16. Travel Expenses (lodging, parking, meals, mileage, etc.)		$430.20		430.20	
17. Other Expenses (other than expert, transcripts, etc.)		$30,505.20		20,642.70	

18. CERTIFICATION OF ATTORNEY/PAYEE FOR THE PERIOD OF SERVICE	19. APPOINTMENT TERMINATION DATE IF OTHER THAN CASE COMPLETION	20. CASE DISPOSITION
FROM 1-5-00 TO 4/26/02		

21. CLAIM STATUS ☑ Final Payment ☐ Interim Payment Number ____ ☐ Supplemental Payment
Have you previously applied to the court for compensation and/or reimbursement for this case? ☑YES ☐ NO If yes, were you paid? ☒ YES ☐ NO
Other than from the court, have you, or to your knowledge has anyone else, received payment (compensation or anything of value) from any other source in connection with this representation? ☐ YES ☑ NO If yes, give details on additional sheets.
I swear or affirm the truth or correctness of the above statements.

Signature of Attorney: _____ Date: 5/10/02

APPROVED FOR PAYMENT — COURT USE ONLY

22. IN COURT COMP.	23. OUT OF COURT COMP.	24. TRAVEL EXPENSES	25. OTHER EXPENSES	26. TOTAL AMT. APPROVED
				$20,642.20

27. SIGNATURE OF THE PRESIDING JUDICIAL OFFICER	DATE	27a. JUDGE CODE
M.C. Dougherty	06.03.02	

BEST AVAILABLE COPY

ITEMIZATION OF TIME FOR APPOINTMENT
UNDER THE CRIMINAL JUSTICE ACT

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
UNITED STATES v. COLEMAN [sic]
[COLEMAN v. MITCHELL]
CASE NO: 98-3545
[Entries not expressly related to clemency are omitted]

* * *

DATE	DESCRIPTION	HOURS	CATEGORY
4/16/02	Attend Clemency Hearing	2.0	A
	* * *		
3/25/02	Telephone Conf./ Meetings Re: Clemency	5.5	D
	* * *		
11/7/0[1]	Review Records – Re Clemency	2.1	H
11/8/01	Research/Investigate Clemency	1.2	H
	* * *		
4/9/2002	Research & Draft Batson & Clemency Petition	4.5	H
4/10/2002	Research, Draft & Edit Batson, 60 (B) & Clemency Petition	5.5	H
4/11/2002	Research, Draft & Edit Batson, 60 (B) & Clemency Petition	6.0	H

4/12/2002	Research & Draft Clemency, Batson & 60 (B)	7.0	H
	* * *		
4/14/2002	Review Batson, Clemency (Meet w/ Co-Counsel)	4.0	H
4/15/2002	Prepare for Clemency Hear[i]ng; Prepare/ Draft Batson Petition	8.5	H
4/16/2002	Prepare for Clemency Hearing	8.5	H
4/17/2002	Research – Batson, Clemency, 60 (B), TV Suit	4.0	H
4/18/2002	Research – Batson, Clemency, 60 (B), TV Suit	4.0	H
	* * *		
4/23/2002	60 (B)/Coleman v. Wilkinson/Clemency, etc.	5.0	H

SUPPLEMENTAL APPENDIX C
[District Court Orders]

(Filed May 11, 2000)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

STANLEY D. LINGAR, Petitioner,	)	
vs.	)	Case No. 89-1954-C-7
MICHAEL BOWERSOX, Respondent.	)	

ORDER

This matter is before the Court upon the motion of petitioner's appointed counsel requesting authorization for payment of attorney's fees and expenses for their representation of petitioner in Missouri executive clemency proceedings.[1] Such authorization is within the scope of 21 U.S.C. § 848(q)'s provision for appointed counsel in federal capital cases and the Criminal Justice Act, 18 U.S.C. § 30006A(c). The request in this case appears to satisfy the three requirements set out by the Eighth Circuit Court of Appeals in *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993), namely that this is a non-frivolous federal habeas corpus proceeding, (2) Missouri law provides no avenue to

[1] The Eighth Circuit appointed Kent Gipson to represent petitioner on October 17, 1997. On December 19, 1999, the Eighth Circuit appointed Jeremy Weis as substitute co-counsel. These appointments shall remain in effect with this Court during the clemency proceedings.

obtain compensation for these services, and (3) the request is made prior to performance of the services.

Accordingly,

IT IS HEREBY ORDERED that the motion of Kent E. Gipson and Jeremy S. Weis to authorize attorney fees and expenses for representation in petitioner's application for executive clemency [Doc. 42] is GRANTED.

IT IS FURTHER ORDERED that Kent E. Gipson and Jeremy S. Weis are authorized to be compensated for their representation of petitioner in an application for executive clemency at a rate of $125.00 per hour.

Dated this 11th day of May, 2000.

/s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

(Filed October 12, 2000)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

JEFFREY LANE TOKAR, Plaintiff,	)	THIS IS A CAPITAL CASE
vs.	)	No. 4:96CV2255 CDP
MICHAEL BOWERSOX, Defendant	)	

ORDER

On motion of petitioner, Jeffrey Lane Tokar, the Court find [sic] that it is reasonably necessary to provide compensation for legal services to be provided by Michael J. Gorla and Elizabeth Unger Carlyle in applying for executive clemency; that the request is made as part of a non-frivolous federal habeas corpus proceeding; and that state law provides no avenue to obtain compensation for such services.

IT IS THEREFORE ORDERED THAT Michael J. Gorla and Elizabeth Unger Carlyle may represent Jeffrey Lane Tokar in his application for executive clemency and that they shall be compensated at such rates and in such manner as previously ordered during their representation of his habeas corpus claim.

Date: 10/12/00 /s/ Catherine D. Perry
UNITED STATES DISTRICT JUDGE

(Filed August 30, 2000)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ANTONIO RICHARDSON,	)	
Petitioner,	)	
vs.	)	Case No. 4:96-CV-2354-JCH
AL LUEBBERS,	)	
Respondent.	)	

ORDER

This matter is before the Court upon the motion of petitioner's appointed counsel requesting authorization for payment of attorney's fees and expenses for their representation of petitioner in Missouri executive clemency proceedings.[1] Such authorization is within the scope of 21 U.S.C. § 848(q)'s provision for appointed counsel in federal capital cases and the criminal Justice Act, 18 U.S.C. § 30006A(c). The request in this case appears to satisfy the three requirements set out by the Eighth Circuit Court of Appeals in *Hill v. Lockhart* 992 F.2d 801, 803 (8th Cir. 1993), namely that (1) this is a non-frivolous federal habeas corpus proceeding, (2) Missouri law provides no avenue to obtain compensation for these

[1] This Court appointed Gino F. Battisti to represent petitioner on December 12, 1996. On May 15, 1997, this Court appointed Lawrence S. Denk as substitute co-counsel. Counsel continued their representation through appeal and the filing of a petition for writ of certiorari. The Court's previous appointments shall remain in effect with this Court during the clemency proceedings.

services, and (3) the request is made prior to performance of services.

Accordingly,

IT IS HEREBY ORDERED that the motion of Gino F. Battisti and Lawrence S. Denk to authorize attorney fees and expenses for representation in petitioner's application for executive clemency is GRANTED.

IT IS FURTHER ORDERED that Gino F. Battisti and Lawrence S. Denk are authorized to be compensated for their representation of petitioner in an application for executive clemency at a rate of $125.00 per hour.

Dated this 30th day of August, 2000.

/s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

(Filed May 2, 2001)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Joseph Amrine,	)	
Petitioner,	)	
vs.	)	No. 90-0940-CV-W-2
Michael Bowersox,	)	
Respondent.	)	

ORDER

Petitioner's motion to authorize attorney fees and expenses for representation in ancillary proceedings (Doc. #182), filed April 10, 2001, is sustained. After review of the estimated budget (Doc. #184), filed April 27, 2001, the Court orders that the budget for attorneys fees and expenses in the executive clemency proceeding not exceed $10,000 (ten thousand dollars).

/s/
Fernando J. Gaitan, Jr.
United States District Judge

Dated: May 02, 2001
Kansas City, Missouri

(Filed December 2, 1998)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RALPH L. DAVIS,	)	
Petitioner,	)	
vs.	)	CASE NO. 92-0061-CV-W-9
MICHAEL BOWERSOX,	)	
Respondent.	)	

The court grants the application filed by petitioner's counsel to be appointed pursuant to the Criminal Justice Act to represent petitioner in connection with his clemency proceedings before the Governor of Missouri.

The court imposes as a limit on the amount the government must pay for attorney fees and expenses the following that are reasonable limits on the amount of time and expense counsel should expend:

Attorney Fees	$6,000
Investigation	500
Services of Expert Witnesses	1,000
Miscellaneous Expenses	500
Total	$8,000

The court believes most of the investigation and legal research required for clemency proceedings has already been performed in connection with these habeas proceedings.

Should the attorney or attorneys representing petitioner require additional expenditure of funds or

additional time representing petitioner, they may make application to the undersigned judge for a modification of this order.

IT IS SO ORDERED.

Dated this 2nd day of December, 1998.

/s/
CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

(Filed February 11, 1999)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JAMES E. RODDEN,	)	
Petitioner,	)	
v.	)	No. 91-0384-CV-W-9
PAUL DELO,	)	
Respondent.	)	

ORDER APPROVING LIMITED AMOUNT FOR PAYMENT OF FEDERAL FUNDS TO PURSUE CLEMENCY

Petitioner requests compensation for counsel to seek executive clemency from the Governor of Missouri. Respondent's counsel advises that no opposition will be filed to the request for payment submitted by petitioner's counsel.

Were it not for *Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993), and the Policy of the Judicial Conference, I would have difficulty in concluding that an appeal to the Governor of Missouri for executive clemency is ancillary to a proceeding seeking federal habeas corpus relief.

Furthermore, if the execution date set by the Missouri Supreme Court was not two weeks away, I would require that a budget be presented and approved before authorizing payment of any federal funds to finance an appeal to the Governor of Missouri for executive clemency. However, because of the shortness in time, I will approve up to $5,000 for reasonable attorneys' fees incurred by Kent Gipson and/or Bruce Houdek without a pre-approved budget. The $5,000 includes reimbursement for reasonable

expenses. Nothing more will be approved without a budget that has been approved before the services are rendered or the expenses incurred.

IT IS SO ORDERED.

/s/
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri

February 11, 1999.

(Filed May 21, 1999)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JAMES CHAMBERS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 95-0369-CV-W-6
	)	
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

ORDER

Petitioner requests compensation for counsel to seek executive clemency from the Governor of Missouri. If not for *Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993), and the unusual statutory provisions there applicable, the court would have no doubt that the request should be denied. *Lockhart*, however, suggests that an appeal for executive clemency is treated as somehow ancillary to a proceeding seeking federal habeas corpus relief. The other conditions specified in *Lockhart* – non-frivolous habeas proceeding and no state law providing for such compensation – are satisfied.

The petitioner has requested Supreme Court review, however, and execution of the sentence will not be immediately imposed. If more than $5,000 will be sought, however, the court will require that a budget be presented and approved before authorizing payment of federal funds in excess of that amount. Counsel is directed to file any such proposed budget, with support, within 30 days of the date of this order.

SO ORDERED.

/s/
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Dated: May 21, 1999.

(Filed February 21, 1997)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

KIRT WAINWRIGHT — PETITIONER

V. — No. Pb-C-92-211

LARRY NORRIS, Director
Arkansas Department of
Corrections — RESPONDENT

ORDER AUTHORIZING PAYMENT OF COUNSEL

Kirt Wainwright was executed by the state of Arkansas on January 8, 1997. At the direction of the Court, Mr. Al Schay served as one of Mr. Wainwright's attorneys throughout the state executive clemency proceedings and federal *habeas corpus* proceedings that preceded Mr. Wainwright's death. The Court finds that Mr. Schay is entitled to compensation for those services. *See* 21 U.S.C. § 848(q). As the Court has noted, compensation for services rendered in *habeas corpus* proceedings is unproblematic. The United States Court of Appeals of the Eighth Circuit has indicated, however, that "before services performed in a state competency or clemency proceeding can be considered reasonably necessary under § 848(q)(10), the district court must be satisfied, first, that the request is made as part of a non-frivolous federal habeas corpus proceeding, and second, that state law provides no avenue to obtain compensation for these services." *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993). Mr. Schay has submitted his affidavit to the Court, and the Court is satisfied that the requirements of *Hill* have been met. The Court has also reviewed Mr. Schay's hourly worksheets and his form detailing the expenses associated with his representation

of Mr. Wainwright. Based on the foregoing, the Court directs that Mr. Schay be compensated $7,588.54 for his services in representing Mr. Wainwright.

IT IS SO ORDERED this 21st day of February, 1997.

/s/ Garrett Thomas Eisele
UNITED STATES DISTRICT JUDGE

(Filed March 6, 1997)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

KIRT WAINWRIGHT — PETITIONERS

v. — No. PB-C-92-211

LARRY NORRIS, Director
Arkansas Department of
Corrections — RESPONDENT

ORDER AUTHORIZING PAYMENT OF COUNSEL

Kirt Wainwright was executed by the state of Arkansas on January 8, 1997. At the direction of the Court, Mr. Craig Lambert served as one of Mr. Wainwright's attorneys throughout the state executive clemency proceedings and federal *habeas corpus* proceeding that preceded Mr. Wainwrights death. The Court finds that Mr. Lambert is entitled to compensation for those services. *See* 21 U.S.C. § 848(q). As the Court has noted, compensation for services rendered in *habeas corpus* proceedings is unproblematic. The United States Court of Appeals of the Eighth Circuit has indicated, however, that "before services performed in a state competency or clemency proceeding can be considered reasonably necessary under § 848(q)(10), the district court must be satisfied, first, that the request is made as part of a non-frivolous federal habeas corpus proceeding, and second, that state law provides no avenue to obtain compensation for these serves." *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993). Mr. Lambert has submitted his affidavit to the Court, and the Court is satisfied that the requirements of *Hill* have been met. The Court has also reviewed Mr. Lambert's hourly worksheets and his form detailing the expenses associated with his representation

of Mr. Lambert [sic]. Based on the foregoing, the court directs that Mr. Lambert be compensated $14,344.01 for his services in representing Mr. Wainwright.

IT IS SO ORDERED this 6th day of March, 1997.

/s/ Garrett Thomas Eisele
UNITED STATES DISTRICT JUDGE

(Filed December 3, 1997)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

EUGENE WALLACE PERRY — PETITIONER

v. — No. PB-C-83-275

LARRY NORRIS, Director, Arkansas Department of Correction — RESPONDENT

ORDER

Eugene Wallace Perry was executed by the state of Arkansas on August 6, 1997. At the direction of the Court, Mr. Craig Lambert served as one of Mr. Perry's attorney [sic] throughout the state executive clemency proceedings and the federal *habeas corpus* proceedings that preceded Mr. Perry's death. The Court finds that Mr. Lambert is entitled to compensation for those serves [sic] pursuant to 21 U.S.C. § 848(q). As the Court has noted, compensation for services rendered in *habeas corpus* proceedings is unproblematic, and the Court finds that Mr. Lambert has shown satisfaction of the requirements set forth by the Eighth Circuit Court of Appeals in *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993), allowing compensation for legal assistance during state clemency proceedings. The Court has also reviewed Mr. Lambert's hourly worksheets and his form detailing the expenses associated with his representation of Mr. Perry. Based on the foregoing, the court directs that Mr. Lambert be compensated $26,306.81 for his services in representing Mr. Perry.

IT IS SO ORDERED this 2nd day of December, 1997.

/s/ Garrett Thomas Eisele
UNITED STATES DISTRICT JUDGE